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No. 81-921

In The

Supreme Court of the United States

October Term, 1981

LOUISE SPENCER AND MIRIAM SPENCER,

Petitioners,

vs.

RIGBY, THATCHER & ANDRUS, P.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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QUESTIONS PRESENTED

1. Have the Petitioners' Fourteenth Amendment rights to equal protection of the laws been violated through the Idaho court's interpretation of § 3-205, Idaho Code, to deny the Petitioners venue in the county of their residence when sued by a lawyer for attorney's fees when other parties defending contract claims are entitled to venue in the county of their residence according to Idaho law?

2. Have the Petitioners' Fourteenth Amendment rights to equal protection of the laws been violated through the Idaho court's interpretation of § 3-205, Idaho Code, to deny the Petitioners the right to jury trial when sued by a lawyer for attorney's fees when other parties defending contract claims are entitled to jury trial according to Idaho law?

3. Have the Petitioners' Fourteenth Amendment rights to equal protection of the laws been violated through the Idaho court's interpretation of § 3-205, Idaho Code, to deny the Petitioners their right to ordinary legal process, including initiation of the action through the filing of a complaint, and including all of the procedural process ordinarily provided by the Idaho Rules of Civil Procedure, when sued by a lawyer for attorney's fees when other parties defending contract claims are, by Idaho law, entitled to those procedural safeguards?

4. Have the Petitioners' right to due process, as provided by the Fourteenth Amendment, been violated through the acts of the Idaho court in its interpretation of § 3-205, Idaho Code, to permit the Respondents to process

their claim for attorney's fees through a lien foreclosure procedure, initiated in a case as to which they are neither parties nor judgment beneficiaries and in the course of which they represented none of the parties, claiming fees in connection with procedures which were totally disassociated with the case in which the lien foreclosure was sought?

5. Have the Petitioners' rights to due process, as provided by the Fourteenth Amendment, been violated through the acts of the Idaho court in its interpretation of § 3-205, Idaho Code, to deny the Petitioners the due process accorded parties defending civil contract claims through ordinary and prevailing procedural processes as provided by the Idaho Rules of Civil Procedure?

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LOUISE SPENCER AND MIRIAM SPENCER,

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vs.

RIGBY, THATCHER & ANDRUS, P.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Idaho entered in this proceeding as a final judgment on April 20, 1981.

OPINION BELOW

The February 10, 1981, Opinion of the Supreme Court of the State of Idaho, made final upon denial of Petition for Rehearing on April 20, 1981, appears in separate appendix hereto at pages App. 1, pp. App. 1-31. The Opinion affirmed the judgment of the District Court of the Seventh Judicial District of the State of Idaho, in and for Bonneville County, Idaho, dated March 27, 1978.

—o—

JURISDICTION

The judgment sought to be reviewed is the final judgment of the Supreme Court of the State of Idaho, dated April 20, 1981, that being the date of denial of Petition for Rehearing following the Opinion of the Supreme Court of the State of Idaho entered February 10, 1981. This Petition for Certiorari was filed within ninety (90) days of the 20th day of April, 1981. This court's jurisdiction is invoked under 28 USC § 1257(3).

—o—

CONSTITUTIONAL PROVISIONS

The constitutional provision involved in the resolution of this matter is the Fourteenth Amendment to the United States Constitution.

—o—

STATEMENT OF THE CASE

The Petitioners question the validity of the judgment of the Supreme Court of the State of Idaho affirming a March 24, 1978, trial court Order Granting Attorneys Fees

and a March 27, 1978, trial court Judgment for Attorneys Fees of $33,125.00 entered by the District Court for Bonneville County, Idaho, without due process, in what was purported to be the foreclosure of an attorneys' lien claim in a case in which the claimant attorneys did not participate, without according the Petitioners the equal protection of the laws of the State of Idaho to a trial in the county of their residence, and without giving the Petitioners the equal protection of the laws of the State of Idaho through jury trial.

The Petitioner Louise Spencer is the widow of S. R. Spencer, who died on September 16, 1960. Spencer's estate was probated in what was then the Probate Court for Bonneville County, Idaho, Case No. 4193. Considerable contest and litigation has arisen, and, indeed, continues, concerning the propriety of the actions of the executor of Spencer's estate and of the transferees of the assets of the estate and of the Petitioners. A number of attorneys have been involved in the representation of the parties, including the Respondents who for a period of time represented the Petitioners in connection with the probate contest and with certain litigation.

On March 31, 1961, the executor of Spencer's estate purported to sell certain assets of the community of the deceased and the Petitioners to Floyd E. Skelton and M. R. Skelton, not parties to the instant dispute. That transfer was attacked by the Petitioner Louise Spencer and three of her children on March 16, 1964, through the filing of a suit in Bonneville County, Idaho, Case No. 13674, by which the Petitioners attempted to set aside the sale. After dismissal of Petitioners' claim in the trial court and reversal of that dismissal in the Idaho Supreme Court, that case was ultimately set for trial May 1, 1973.

In the course of the proceedings of Case No. 13674, the Respondents were engaged as attorneys for the Petitioners. Their representation began on September 16, 1970. The Respondents were also engaged in a number of other procedures for the Petitioners, including the representation of the Petitioners in a hearing upon their request for the removal of the executor appointed to administer Spencer's estate. That removal hearing was held November 26, 1971.

On December 6, 1973, Floyd E. Skelton and the Idaho Livestock Commission Company, not parties to the present dispute, initiated the action, in which the complained-of award of judgment for fees ultimately entered, against the Petitioners to enforce a purported agreement of May 2, 1973, according to the terms of which the Petitioners settled that part of their claim in Case No. 13674 which was against Skelton, and agreed to sell stock owned by them and by the estate in the Idaho Livestock Commission Company, to Skelton and the Company. App. 2, p. App. 33. That action was filed in the District Court for Bonneville County, Idaho, Case No. 20500. The Respondents at no time represented either the Petitioners or any of the parties in Case No. 20500.

On February 13, 1975, the Respondents filed, in Case No. 20500, a document labeled "Notice of Attorneys' Claim of Lien" in which it was claimed that the Petitioners were indebted to the Respondents for Respondents' legal services according to what they have styled as a written contract of March 6, 1973, and March 9, 1973. App. 2, p. App. 35. In that "Notice" they claimed fees as follows:

(a) For services in connection with the attempt to remove the executor culminating in the hearing of November 26, 1971	$ 7,500.00
(b) For services in connection with the preparation for trial in Case No. 13674	5,000.00
(c) For a purportedly contracted 15% of the settlement proceeds in Case No. 13674 and of the sales proceeds of the stock of the Idaho Livestock Commission Company	28,125.00
TOTAL	$40,625.00
Plus Costs	2,284.75
Less Credits	7,444.85
NET	$35,464.90

App. 2, pp. App. 37-39.

No request was made by the Respondents to intervene in Case No. 20500, nor were they ever recognized as a party to that case; neither were they the beneficiaries of the judgment entered upon the merits of the case.

On January 22, 1976, judgment ultimately entered in Case No. 20500 requiring the specific enforcement of the purported agreements of May 2, 1973. App. 2, pp. App. 43-50. Upon appeal to the Idaho Supreme Court the judgment was affirmed. App. 2, p. App. 50.

On August 3, 1977, the Respondents, never parties to Case No. 20500, which by then had been reduced to judgment without any reference whatever to the Respondents, initiated a claim against the Petitioners in that case by the filing of the affidavit of the Respondent, Gordon S. Thatcher. App. 2, pp. App. 51-54. The Respondents, in the Thatcher Affidavit, made no direct claim against the Pe-

titioners; the only thing remotely resembling a prayer for relief is this language from the affidavit:

> ". . . Rigby, Thatcher & Andrus, P.A., are entitled to an immediate order of the Court making provision as herein requested (and order of the Court authorizing and directing the Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Bonneville County, to retain from the proceeds deposited with said Clerk by Defendant pursuant to the settlement agreements made by and between Defendants and Plaintiffs referred to above, a sum of Twenty-eight Thousand One Hundred Ninety-seven Dollars and 60/100 ($28,197.60); authorizing and directing said Clerk to pay directly to Rigby & Thatcher, a partnership, and to Rigby, Thatcher & Andrus, P.A., the sum of Twenty-eight Thousand One Hundred Ninety-seven Dollars and 60/100 ($28,197.60) from the proceeds deposited with said Clerk . . .) and granting any of the interested parties above named an opportunity to appear and show cause why any of the provisions of said order should be modified or rescinded." App. 2, pp. App. 41-43.

Based upon that affidavit, the trial court, a day before the affidavit was actually filed, issued its "Order and Order to Show Cause" requiring the Clerk of the Court to pay the requested sums over to the Respondents and requiring the Petitioners, or any of the other parties to Case No. 20500, to appear before the Court "to show cause why any portions of this order should be modified or rescinded." App. 2, pp. App. 54-56.

On August 15, 1977, the Petitioners filed their "Motion to Strike Order and Response to Order to Show Cause" in which they resisted any claim of the Respondents and any proceedings for the collection of fees in connection with Case No. 20500. App. 2, pp. App. 56-58. In

their accompany Affidavit, the Petitioners specifically: (1) raised the issue of due process against the initiation of a claim against them, in a disassociated case, without appropriate legal procedure; (2) specifically raised their right to have any claim against them litigated in the county of their residence; and (3) specifically raised their claim to a right to jury trial. App. 2, pp. App. 58-61.

The Petitioners' claims notwithstanding, the trial court permitted the Respondents to proceed with their prosecution of claim to fees, without appropriate process, as a part of Case No. 20500 in Bonneville County, rather than in Twin Falls County, Idaho, the venue of residence of the Petitioners, and without jury trial. App. 2, pp. App. 61-64.

In a separate document entitled "Response to Claim for Attorneys Fees by Gordon S. Thatcher", filed October 18, 1977, the Petitioners reasserted their claim to trial in the county of their residence, and their right to due process through ordinary procedural steps rather than in an action in which the claimants were not parties. App. 2, pp. App. 64-69. In the same document they reaffirmed their claim to jury trial. App. 2, p. App. 68.

The Trial Judge ultimately rejected the Petitioners' due process claims and their claims to equal protection of the law through trial in the county of proper venue and jury trial. Upon an Order Granting Attorney Fees entered March 24, 1978, the trial court, on March 27, 1978, gave judgment to the Respondents for the full amount of their claim. App. 2, pp. App. 69-73.

Appeal was taken to the Idaho Supreme Court where, on February 10, 1981, a divided court affirmed the trial court's judgment. A timely petition for rehearing was

filed on February 26, 1981. An order denying the petition for rehearing was entered by the Idaho Supreme Court on April 20, 1981.

The federal questions sought to be reviewed in this court were raised both in the trial and upon appeal to the Idaho Supreme Court. The claim for attorneys' fees which is the subject of the appeal below and of this petition was initiated through the August 3, 1977, filing of the Affidavit of Gordon S. Thatcher and by the August 2, 1977, issuance of the trial court's Order and Order to Show Cause. App. 2, pp. App. 51-56. The Petitioners immediately moved to strike the Order and immediately responded to the Order to Show Cause. App. 2, pp. App. 56-58. The motion was filed on August 15, 1977. Contemporaneously therewith, Petitioner Louise Spencer filed her Affidavit in support of that motion, claiming her right to due process, to trial in the venue of her residence, and to jury trial in the following language:

> "The affiant believes that she is entitled to defend any claim for fees against her and that any action for fees would have to be brought in a separate claim in the forum of the affiant's present residence, Twin Falls County, Idaho, where she would be entitled to jury trial and where she would be entitled to full presentation of the claim both procedurally and factually and be entitled to assert her defenses to the claim."

App. 2, p. App. 59.

Those same arguments were addressed to the trial court upon hearing on August 24, 1977. App. 2, p. App. 61.

The Petitioners once again raised the constitutional issues in their Response to Claim filed October 18, 1977. App. 2, pp. App. 64-69. This language was there employed by the Petitioners:

> "The answering defendants allege that the proper venue of this case is in Twin Falls County, Idaho, and not in Bonneville County, Idaho."

Further:

> "The answering Defendants allege that no action is cognizable in this case, as concerns the claim of the affiant and his law firm for attorneys' fees, and that any such claim must be made by separate claim for relief in a separate lawsuit."

App. 2, p. App. 83.

In that same document, demand was made for jury trial. App. 2, p. App. 68.

The same arguments were addressed to the court upon hearing on December 14, 1977. App. 2, pp. App. 73-76. This was the language employed by counsel for the Petitioners upon hearing:

> "Preliminary to the hearing on the motion I would like to make the record clear that earlier this fall on behalf of Mrs. Spencer we addressed arguments to the Court relating to the merits of this matter and to the procedural aspects and we want the record to be clear that we do not in any way waive our claims which are basically three: One, that this is not an appropriate procedural vehicle for the disposition of this claim. An independent suit would have to be filed. Two, that the venue is not correct. Mrs. Spencer is a resident of Twin Falls County and it is not appropriate to hear this case in Bonneville County. Thirdly, that a jury demand has been made. We realize that the Court has denied that request, but we want the record to show that we believe that this case is appropriate for disposition upon a jury demand, and, by a jury."

The federal questions continue to be raised throughout the Petitioners' appeal to the Idaho Supreme Court.

App. 2, pp. App. 76-78. This is a part of the text of the Petitioners' opening brief before the Idaho Supreme Court:

> "The procedural infirmities in this action were:
>
> "(a) An independent action was required by law—none was prosecuted;
>
> "(b) The action should have been required to be instituted in the appropriate venue—this action was prosecuted in an inappropriate venue:
>
> "(c) Appropriate pleadings should have been required of the claimant so that the defendant would have an opportunity to make appropriate response thereto—no such pleadings were here required or presented;
>
> "(d) When a jury demand was made, a jury trial should have been given—a demand was made in this case, but no jury trial was given the defendants."

These questions were presented to and rejected by the Idaho court upon appeal. App. 1, pp. App. 76-78.

REASON FOR GRANTING THE WRIT

The Idaho Courts have in this case created a special class of litigants.

In the Idaho Courts all non-lawyer claimants are obliged to initiate an action for recovery of a contract claim by complaint. Rule 3 (a), Idaho Rules of Civil Procedure. Once the claim is made in that manner, the defendant has all of the due process protections of the 71 specific rules relating to general jurisdiction procedures which are a part of the Idaho Rules of Civil Procedure. By the Idaho Supreme Court's decision herein, no such

requirement is impressed upon a lawyer claimant and no such safeguards are given to the non-lawyer party against whom a claim for attorneys' fees is made.

In the Idaho Courts a non-lawyer claimant is obliged to litigate his contract claim against the defendant in the county of the defendant's residence. § 5-404, Idaho Code. By the Idaho Supreme Court's decision here, no such requirement is imposed upon a lawyer, and a non-lawyer sued by a lawyer claiming attorneys' fees has no right to venue in the county of his residence.

In the Idaho Courts a party sued by a non-lawyer is entitled to jury trial. Art. 1, § 7, Constitution of the State of Idaho; Rule 38 (a), I. R. C. P. No such right accrues to a non-lawyer defendant sued by a lawyer for fees.

As Justice Stephen Bistline summarized the situation in his dissent to the Opinion below:

> "It (the majority's disposition of the case) is subject to being classified as special legislation which gives an attorney creditor vastly superior rights to those of a general non-attorney creditor—in particular depriving the alleged debtor of any right to a jury trial."

Through their disposition of this case, the Idaho Courts have offended the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution.

The net effect of the decision below is to permit a lawyer claimant to group all of the potential claims he may have against a former client, whether or not in any way associated with a particular phase of the representation of that client, into one all comprehensive claim of

lien, and to permit the lawyer to enforce that claim of lien under the Idaho Attorneys Lien Statute (§ 3-205, Idaho Code) in a court action which has been reduced to judgment and is at rest, in which the lawyer is no party by intervention or otherwise, without due process, without the proper venue and without jury trial.

As interpreted by the Court below, the Idaho statute, § 3-205, unquestionably creates a discriminatory classification for the benefit of lawyer claimants to the disadvantage, and to the denial of equal protection, of those against whom the claims are made, a discrimination which bears no fair, substantial, natural, reasonable or just relation to any object for which the statute may have been proposed.

As this Court has frequently mandated, the equal protection of the laws requires the protection of equal laws. The state's obligation is to give the protection of equal laws by the equal operation of its laws within its jurisdiction. *State of Missouri v. Canada*, 305 U. S. 337, 350, 59 S. Ct. 232, 236 (1938); *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 S. Ct. 1064, 1070 (1886). The states are denied, by the Equal Protection Clause of the Fourteenth Amendment, the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *Eisenstadt v. Baird*, 405 U. S. 438, 447, 92 S. Ct. 1029, 1035 (1972); *Reed v. Reed*, 404 U. S. 71, 75-76, 92 S. Ct. 251, 253 (1971). An obvious statutory discrimination must be based upon some proper and justifiable distinction for the classification to pass constitutional muster. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U. S. 459, 461-462, 57 S. Ct. 838-840 (1937); *Louisville*

Gas & Electric Company v. Coleman, Auditor, 377 U.S. 32, 37-38, 48 S. Ct. 423, 425 (1928); *Louisville & N. R. Company v. Milton*, 218 U. S. 36, 30 S. Ct. 676 (1909). This is a part of the language of the Court in *Hartford Steam Boiler*:

> "It may be said generally that the Equal Protection Clause means that the rights of all persons must rest upon the same rule under similar circumstances . . . The attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any such basis' . . . Despite the broad range of the state's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. Borden's Company v. Baldwin, 293 U. S. 194, 209, 55 S. Ct. 187, 191, 79 L. Ed. 281. They cannot stand as reasonable if they offend the plain standards of common sense."

The validity or invalidity of a state statute depends upon the interpretation placed upon that statute by a state court. *American Motorists Insurance Company v. Starnes*, 425 U. S. 637, 644, 96 S. Ct. 1800, 1804 (1976); *Concordia Fire Ins. Co. v. People of State of Illinois*, 292 U. S. 535, 545, 54 S. Ct. 830, 834 (1934).

While no specific procedural means are generally required in state civil litigation, it is required that the procedures offer all litigants the equal benefit and application of the procedural rules. *American Motorists Insurance Company v. Starnes*, 425 U. S. 637, 644, 96 S. Ct. 1800, 1804 (1976); *Cincinnati Street Railway Company v. Snell*, 193 U. S. 30, 24 S. Ct. 319, 321-322 (1903). The state court procedures must ordinarily be the same as to all litigants

unless a substantial reason for a difference among litigants is established. *Lindsey v. Normet,* 405 U. S. 56, 77, 92 S. Ct. 862, 876 (1972); *Board of Education v. Alliance Assur. Co.,* 159 F. 994, 999-1000 (Cir. Ct. N. D. Calif. 1908). This is the language of the Court in *Board of Education v. Alliance Assur. Co.:*

> "There must be some relation between the difference in class and the difference in the rule of practice involved." *Id.,* p. 999.

A state is not permitted to offer particular venue privileges to one set of litigants and fewer venue privileges to another set, where there is no reasonable basis for the classification. *Power Mfg. Co. v. Saunders,* 274 U. S. 490, 493-495, 47 S. Ct. 678, 679-680 (1927). This is a part of the language of the Court (at p. 495 (US), p. 680 (S. Ct.)):

> "It of course rests with the state to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not accepted, but must fall like others when in conflict with those limitations."

Further:

> ". . . Venue provisions must conform to the Equal Protection Clause and are invalid where they discriminate arbitrarily either against individuals or corporations. Grocer's Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 474, 475, 89 P. 120; McClung v. Pulitizer Publishing Co., 279 Mo. 370, 214 S. W. 193."

It is also a denial of equal protection to grant one group of litigants the right to jury trial while denying another group that same right, without any rational basis

for the different classification. *Humphrey v. Cady*, 405 U. S. 504, 512, 92 S. Ct. 1048, 1053 (1972); *Baxtrom v. Herold*, 383 U. S. 107, 110, 86 S. Ct. 760, 762 (1966); *Lynch v. Baxley*, 386 F. Supp. 378, 395 (DC MD Ala. 1974). This is a part of the language of Judge Johnson in the Alabama case:

> "The state of Alabama, having thus granted the right in some cases, may not deny it in others except on the basis of a rational distinction.
>
> ". . . If juries are used in civil commitment proceedings, equal protection requires that all commitment juries throughout the state perform the same function: If the jury is the fact-finder in some jurisdictions, it must be the fact-finder in all jurisdictions."

Cf. *Ex Parte Peterson*, 353 U. S. 300, 40 S. Ct. 543, 546 (1920); *Backus v. Foot Street Union Department Company*, 169 U. S. 557, 18 S. Ct. 445, 451 (1898).

CONCLUSION

Because the Petitioners have been denied equal protection of the laws through the Idaho court's interpretation of the statute in question and denied due process of law, a Writ of Certiorari should issue to review the Judgments and Opinions of the Supreme Court of the State of Idaho.

Respectfully submitted,

WEBB, BURTON, CARLSON, PEDERSEN & PAINE

By LLOYD J. WEBB

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Twin Falls, Idaho 83301

Attorneys for Petitioners

APPENDIX 1

1981 OPINION NO. 6

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12969

Pocatello, March Term, 1980

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER and MIRIAM SPENCER,

Defendants-Appellants,

LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, and JANET SPENCER, and IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants,

RIGBY, THATCHER & ANDRUS, P.A.,

Claimants-Respondents.

Filed: February 10, 1981

R. H. Young, Clerk

Received: February 11, 1981

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Willard C. Burton, District Judge.

Appeal from order and judgment of district court awarding attorney fees. Order and judgment *affirmed.*

Lloyd J. Webb, of Webb, Burton, Carlson, Pedersen & Payne, Twin Falls, for appellants.

Gordon S. Thatcher and G. Rich Andrus, of Rigby, Thatcher & Andrus, P.A., Rexburg, for respondents.

McFADDEN, J.

This appeal involves the attempted assertion and enforcement of an attorney's charging lien. Holding that the assertion of the claims involved here in the manner selected was proper, we affirm.

The appellant's husband, S. R. Spencer, died in 1960. At that time, he was one of the partners in the Skelton-Spencer Trading Company, a partnership which held all the capital stock of the Idaho Livestock Auction Company, an Idaho corporation. The Trading Company was involved in the purchase and sale of livestock. The Auction Company was engaged in an auction sale business on real property owned by and leased from the Idaho Livestock Commission Company. Spencer in his lifetime owned 24½% (127½ shares) of the stock of the Commission Company.

Upon Spencer's death, the Idaho First National Bank was appointed executor pursuant to his will. The bank then sold Spencer's partnership interest in the Trading Company (and thus the Auction Company) to the surviving partners, M. R. Skelton and Floyd Skelton. The probate court (case no. 4193, Seventh District Magistrate Division, Bonneville County) confirmed the sale. The appellant, Mrs. Spencer, initiated an action (no. 13674, Seventh District, Bonneville County) against the bank and the Skeltons in 1964 alleging her husband's interest in the Trading/Auction Companies had been sold at an

undervalued figure. The district court dismissed that action for failure to obtain jurisdiction over an indispensable party, a ruling this court reversed, remanding the case for further proceedings. Spencer v. Spencer, 91 Idaho 880, 434 P. 2d 98 (1967).

Thereafter, in 1970, Mrs. Spencer discharged her attorneys and approached the firm of Rigby & Thatcher (now Rigby, Thatcher & Andrus) with a request for representation in a number of related legal areas. She had many concerns which included not only the above mentioned sale, but also the performance of the executor of her deceased husband's estate, the validity of certain disclaimers entered into by her children, the extent of the partnership and corporate interests held by her husband and the efforts necessary to realize upon them, and other matters.

Rigby & Thatcher agreed to take on the myriad legal concerns of Mrs. Spencer in regard to the estate. An agreement was later made through correspondence which set the parameters of the representation. Mr. Thatcher wrote on March 6, 1973:

"Dear Louise:

To avoid any misunderstanding, I believe we should have an agreement as to our compensation in these various matters:

1. Removal of Executor and Approval of Disclaimer of Heirs. $7,500.00 and if an appeal is taken to the Supreme Court an additional $2500.00. This is regardless of outcome.

2. Pending law suit against Idaho First National Bank, et al. $5,000.00 if resolved at trial stage and an additional $2500.00 if involving an appeal to the Supreme Court, regardless of outcome. Plus an addi-

tional fee, contingent on outcome, of 15% of all sums recovered.

3. Potential suit against Idaho Livestock Commission Company. If settled without suit (such as a package settlement of all claims) then 15% of all sums recovered. If a suit is required, then $5,000.00 if resolved at trial stage and an additional $2500.00 if involving an appeal to the Supreme Court, regardless of outcome, plus an additional fee contingent on recovery, of 15% of all sums recovered.

Please write me of your acceptance of this arrangement. If there are any questions on it please call or write.

All of this will be plus actual costs disbursed.

This has already required a tremendous expense and effort on our part with much more required in the future.

It appears you will want a court determination on all of these matters.

Sincerely,

/s/ G. S. Thatcher"

Three days later Mrs. Spencer replied that "the proposed fees are entirely reasonable and acceptable to me." This agreed upon representation clearly contemplated the recoverable of a sizable sum for Mrs. Spencer from the related endeavors, and provided for the payment of compensation to the firm depending upon the contingencies encountered in achieving this recovery.

As noted in the letter, Rigby & Thatcher were to institute proceedings for the removal of the bank as executor of the estate and to secure approval of the previously filed disclaimers of the Spencer children. Prior

to the sending of the March 6 letter, Rigby & Thatcher had so petitioned the probate court in case no. 4193. These matters were awaiting decision when the present litigation concerning the attorney's lien arose.

The firm was also requested to proceed with the pending action, no. 13674, concerning the allegedly undervalued sale of the partnership interest. After remand by this court, Spencer v. Spencer, 91 Idaho 880, 434 P. 2d 98 (1967), no action was taken for some time. The case was ultimately set for trial on May 1, 1973.

The other action contemplated was a potential suit against the Commission Company in the nature of a shareholder's action to obtain a recovery for Mrs. Spencer for rents owed to the Commission Company by the Auction Company and for allegedly unpaid dividends on the stock owned by her husband. It was apparently understood that Rigby & Thatcher would try to compel the bank to seek this recovery before actually filing their own suit; an alternative prayer for relief in the petition for the removal of the bank as executor in case no. 4193 so requested.

The claims of the plaintiffs (Mrs. Spencer and the children) in no. 13674 were settled on May 2, 1973 as to all parties save the bank, against whom the right of further action was reserved. This settlement also resolved the rent and dividend claims against the Commission Company noted above.

Two agreements were entered into in regard to this settlement. Mrs. Spencer entered into a covenant not to sue the Commission Company in consideration of $150,000 with $25,000 being paid upon execution and the remainder

due upon Mrs. Spencer obtaining the ratification of the children. Mrs. Spencer relinquished her Commission Com-Company stock by way of this agreement. She also signed a covenant not to proceed further and not to execute in case no. 13674, releasing those claims (save any against the bank) for $37,500. $5,000.00 of this amount was immediately paid. Thus a total of $187,500 was paid or obligated in settlement of Mrs. Spencer's various claims concerning the estate of her husband.

Subsequently, in July 1973, Mrs. Spencer became dissatisfied with her legal representation and discharged Rigby & Thatcher as her attorneys. She concommitantly refused to perform the settlement agreements. The other parties to the agreements (Skelton and the Commission Company) then commenced an action (no. 20500, Seventh District, Bonneville County) against Mrs. Spencer, her children, and the bank as executor seeking specific performance. This action also desired to determine all claims of the defendants against the settlement amounts.

During the course of this litigation, Rigby & Thatcher filed notice of claim of attorney's lien in case no. 20500, case no. 13674, and the probate case no. 4193. Following a trial to the court in case no. 20500, judgment was rendered granting specific performance of the settlement agreements. Mrs. Spencer appealed to this court and in Skelton v. Spencer, 98 Idaho 417, 565 P. 2d 1374 (1977), *cert. den.* 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed. 2d 758 (1978), that decision of the district court was affirmed. The plaintiffs in case no. 20500 then deposited with the district court the remaining unpaid balance ($157,500) due under the settlement agreements.

Rigby & Thatcher thereafter filed a petition in no. 20500 to enforce the lien against the fund. They sought an order directing payment of claimed fees and an order to show cause directing Mrs. Spencer to appear and show why the claimed lien should not be enforced. The court issued an order directing the clerk to pay the attorneys but allowing Mrs. Spencer a time in which to respond.

Mrs. Spencer, now represented by other counsel, answered by way of a motion to strike the order and an affidavit of Mrs. Spencer in opposition to the lien and claimed fees. She also raised objections to venue and asserted a right to a jury trial on the question of the lien. Argument was had and the court denied the motion to strike. Mrs. Spencer's attorney then filed a "response" to the claimed lien in which improper venue and the right to a jury trial were again asserted, and dismissal of the claim sought. Mrs. Spencer also alleged that any such lien claim must be brought in an independent law suit.

The matter of the asserted lien was set for hearing on the pending order to show cause in October of 1977, but was continued to December 14, 1977, upon the stipulation of the parties. Subsequent to the hearing, at which all parties were heard on the merits of the lien issue as well as the raised objections, the district court entered an order on March 24, 1978, granting attorney fees. The court noted that Mrs. Spencer had appeared and contested the relief sought by the attorneys, reasserting those contentions mentioned above. The court found that Mrs. Spencer and Gordon Thatcher entered into an agreement whereby the firm was to be paid a fee of $5,000 plus 15% of all sums recovered; that the litigation was settled through the agreements under which $187,500 was to be

paid; that the intent of the parties was that the 15% contingency was meant to apply to all sums recovered;[1] and that the attorneys were entitled to the fee as set forth, i. e., $5,000 plus 15% of $187,500.

Thereafter, on March 27, 1978, the district court entered judgment for the fees, noting that the order of March 24 contained findings of fact and that the judgment supplemented those findings. In this document, the court noted that under the fee agreement the attorneys were also to receive $7500 for their services in regard to the removal of the executor in the probate matter no. 4193. Stating that the attorneys' work in this matter was substantially completed though no court decision had been reached prior to the settlement, the court found that the sum of $5,450 previously paid to Rigby & Thatcher by Mrs. Spencer adequately compensated them in this regard. The court also recognized that Rigby & Thatcher held $8,866.17 in trust for Mrs. Spencer, and allowed this sum to be applied against the owed fees. Therefore judgment was entered in the amount of $33,125.00 of which the sum of $24,258.83 remained to be paid after applica-

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1 The court stated in this regard that the contingency was meant to apply to all sums recovered and not just those above a previously offered "sales price". This comment refers to the argument of appellant at trial and here that part of the sum involved in the settlement of claims represented the purchase price of appellant's stock in the Commission Company and was not to be considered part of the "sums recovered." The language in section "3" of Thatcher's letter stands opposed to this argument. And the trial court, clearly in the best position to analyze this question, ruled that the parties' intent was that *all* sums recovered be subject to the contingent fee agreement. This conclusion is not clearly erroneous, is supported by the evidence, and will stand on appeal. Higgenson v. Westergard, 100 Idaho 687, 689, 604 P. 2d 51, 53 (1979).

tion of the $8,866.17 trust amount. The clerk of the court was directed to pay over that amount from the funds on deposit with the court. This appeal followed from the order of March 24 and the judgment of March 27.[2]

At the outset, we find that the attorneys could seek to enforce their lien by petition in case no. 20500 as opposed to maintaining an independent action. Speiser in his treatise, Attorneys' Liens (1973), makes the following statement.

> "It has been held that an attorney's lien on property recovered may, upon application to the court, be enforced in the original action in which the services were rendered. An approved procedure, where a charging lien has attached to a judgment or where money has been paid into court, is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined. There is no right to a jury trial in the proceeding." Speiser, § 16.36, pp. 399-400.

See also, 7 Am. Jur. 2d § 345 (1980).

At least three Idaho cases have impliedly recognized the ability of an attorney to assert and enforce a charging lien in the action in which it arose. See Updegraff v. Adams, 66 Idaho 795, 169 P. 2d 501 (1946); Renfro v. Nixon, 55 Idaho 532, 45 P. 2d 595 (1935); Taylor v. Taylor,

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2 The covenants signed by the parties indicated that a total sum of $187,500 was to be paid in settlement of the disputes. The figures entered by the court in the judgment of March 27 are based on this amount, i. e., the attorneys were awarded $5,000 plus 15% of $187,500 ($5,000 plus $28,125) for a total award of $33,125. (This award was to be satisfied through application of the $8,866.17 held in trust and $25,258.83 from the deposited funds as noted above). This ruling of the court corrects the apparent error in the court's order of March 24, which refers to a base sum of $187,000.

33 Idaho 445, 196 P. 211 (1921). Other jurisdictions have come to the same conclusion in more express terms. For example in Gee v. Crabtree, 560 P. 2d 835 (Colo. 1977), the Colorado Supreme Court was faced with an appellate court decision holding that the exclusive method of enforcing a charging lien was by way of an independent civil action. That analysis was overturned, the Supreme Court reasoning that while an independent action was certainly a proper means of enforcement, it manifestly was not the sole means. The court stated:

> "To restrict the means of enforcement of an attorney's lien *solely* to independent civil actions would be a waste of judicial time, as well as contrary to the legislative intent reflected by the statutory language. The trial judge who heard the proceedings which gave rise to the lien is in a position to determine whether the amount asserted as a lien is proper and can determine the means for the enforcement of the lien. . . . In our view, the attorney's charging lien may not only be asserted but may be enforced, in the civil action which gave rise to the lien claim, or, in the alternative, in an independent action." 560 P. 2d at 836. (Emphasis in original.)

The Colorado statute granting a charging lien is without substantive difference from our own with the exception of providing for enforcement "by the proper civil action" and defining with slightly greater specificity the means for filing notice of claim. See C. R. S. § 12-5-119.

Renfro, supra, and the other Idaho cases indicate that the purpose of the Idaho attorney's lien statute is to secure payment for legal services rendered. As in *Gee, supra,* were attorneys forced to maintain a separate legal action to assert and recover upon their liens, the function of the statute would be impaired. Both methods of enforcement, the independent action and the petitioning

within the original action, are legitimate courses for attorneys to take in seeking satisfaction upon their statutorily granted liens. Speiser, *supra*, at §§ 16.36, 16.39; 7 Am. Jur. 2d §§ 345, 347 (1980); Tisdale v. Wheeler Bros. Grain Co., 599 P. 2d 1104 (Okla. 1979); Earl v. Las Vegas Auto Parts, 307 P. 2d 781 (Nevada 1957).

The above statements of the law on this point engender a related area of inquiry—in what action, and for what services rendered, may the lien be asserted. In the terms provided by the instant case, may the attorneys assert their lien by petition in case no. 20500 after giving notice of the lien in all three matters, and, if so, what recovery is possible. Again Speiser's treatise provides a starting point.

> "In the absence of a statute or a special agreement, a charging lien does not extend beyond the charges and fees in the suit in which the judgment was recovered; it does not cover any general balance that may be due the attorney from the client for professional services rendered in other causes or transactions. . . . However, the charging lien has been held to extend to charges for fees or disbursement in suits incident to, or growing out of, the principal object of the employment." *Speiser, supra* § 16.17, p. 384.

See also 7A C. J. S. § 364, p. 724. Thus the court is faced with the determination as to the nature of the employment relationship between the client and the attorney in order to decide for which actions, and in which actions, the assertion and enforcement of the lien is proper.

Mrs. Spencer, as noted, hired Rigby & Thatcher to represent her in a complex and interrelated legal situation. All of the matters concerned the estate of her deceased

husband. Though cast in terms of three actions, it is clear that all the planned legal efforts were but different fronts on the same battlefield. The alternative relief prayed for in the probate petition evidences this. The fee agreement entered into between the parties also reflects this interdependence; indeed, that agreement makes the parenthetical observation that the various actions could possibly be resolved in a "package settlement of all claims." Any attorney hired in this situation would necessarily be forced to analyze the facts and legal options as an interrelated whole as determinations made in one area of the complex litigation would certainly affect others. As a matter of good common sense, a person in Mrs. Spencer's position would do exactly as she did here—hire one attorney or firm to handle these factually and legally commingled matters.

Case law supports the recognition of the nature of such interdependent actions and the single assertion of a lien to secure compensation for the services provided therein. A number of older cases directly addressing this point are annotated at 97 A. L. R. 1133, "Attorney's charging lien as including services rendered or disbursements made in other than the instant action or proceeding." (Subsection "b" of that annotation concerns liens for services rendered in matters growing out of or in connection with the case in which judgment is rendered.) Lapse of time has not impaired the logic of these cases. One case there cited, In Re Abruzzo, 249 N. Y. S. 72 (1931), is illustrative.

Attorneys for the beneficiaries of a decedent's trust petitioned in *Abruzzo* for enforcement of a charging lien in an estate accounting proceeding. The court held that

the attorneys were entitled to assert a lien coextensive with the services they had performed in all estate-related procedings leading up to the accounting since, even though theoretically separate, the actions were in reality an integrated whole. To hold otherwise, the court said, and deny the interrelationship and the ability of the attorneys to assert and enforce the lien, would be absurd for no recovery on the part of the beneficiaries could be possible in the accounting proceeding without the earlier representation. Other more recent cases have similarly refused to elevate the "form" of separate actions over the "substance" of essentially unitary legal representation. See, e. g., U. S. v. Preston, 232 F. 2d 77 (9th Cir. 1956), *cert. den.* 352 U. S. 871, 77 S. Ct. 97, 1 L. Ed. 2d 77; Spinello v. Spinello, 334 N. Y. S. 2d 70 (1972); Butler v. Breckinridge, 442 P. 2d 313 (Okla. 1967). See generally, Speiser, *supra*, § 16.17; 7 Am. Jur. 2d § 328 (1980).

In light of this authority and the facts before the court here, including the agreed upon unitary representation evidenced by the fee agreement, the fact that there are arguably three "separate" actions is not determinative. A petition in any of the three causes after proper notice having been given would have been sufficient to raise the question of enforcement of the attorney's lien for services performed for Mrs. Spencer. As explained below, however, a petition in no. 20500, situs of the funds here involved, was the most reasonable.[3]

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3 Our determination that the petitioning herein was a proper method of raising and seeking to enforce the attorneys' lien regarding these claims disposes of appellant's venue objection. (Appellant asserted that venue was proper only in Twin Falls

(Continued on next page)

The law is well settled that an attorney in asserting a charging lien is entitled to recover against sums which his efforts have brought forth. Variously phrased, the intent of the law on this point is to allow the attorney an interest in the fruits of his skill and labors. The lien secures his right to compensation for obtaining the recovery or "fund" for his client. Of course, where the attorney's efforts are sterile, there would be nothing against which the lien right could be asserted, but where he has produced a fund, he has an equitable interest therein recognized by the lien statute and relevant case law.

The Idaho Code speaks of the lien attaching to "a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosoever hands they may come." I. C. § 3-205. Further, this interest cannot be defeated or affected "by any settlement between the parties before or after judgment." *Id.* The monies paid into court in case no. 20500 were the product of the settlement brought forth by the efforts of Rigby & Thatcher. Previous Idaho law has recognized, consonant with the statutory language, the right of attorneys to seek a lien recovery against the settlement "proceeds . . . in whosoever hands they . . . come." Miller v. Monroe, 50 Idaho 726, 300 P. 362 (1931); Hansborough v. D. W. Stanrod & Co., 43 Idaho 119, 249 P. 897 (1926).

In *Hansborough,* the attorney handled two separate foreclosure proceedings against a debtor for a bank. Each

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(Continued from previous page)

County, the county of her residence. I. C. § 5-404). Venue in the Seventh District Court in Bonneville County would be improper only if an independent action was required as to all or part of the claims here asserted by the attorneys. Such is not the case.

action was settled, the bank receiving stock among other things for their interest. Before the client bank credited the account of the attorney (the agreed upon method of payment for the legal services), the bank failed and was taken over by the Commissioner of Finance. The attorney at that point filed a petition with the Commissioner noting his lien claim as to the settlement proceeds and seeking enforcement thereof. On appeal the Supreme Court held that the attorney's charging lien as asserted attached to the stock obtained by the bank in the settlement of the earlier foreclosure actions, this being the "proceeds" mentioned by the statute which the attorney's services produced. The fact that the attorney had properly petitioned the Commissioner for relief, and that the stock was in the control of the Commissioner, led the court to conclude that this was a proper site for enforcement of the lien. In comparison, the proceeds of the settlement in the instant case are within the control of the court which has been properly petitioned for enforcement of the charging lien.

The court in Almi, Inc. v. Dick Corp., 375 A. 2d 1343 (Pa. Comw. 1977), was faced with a complex factual situation which resulted, as here, with a sum representing an earlier unpaid settlement amount being deposited with the court pending resolution of legal issues. One claimant to the sum was an attorney for one of the parties who was asserting a charging lien for services performed in the action rendering the settlement. The attorney had represented his client under a contingency agreement providing for a percentage of the sums recovered. The court stated:

> "[w]hen . . . a fund is deposited in court for judicial distribution, the court makes the distribution based

on equitable principles and may recognize the attorney's charging lien. . . . In Recht v. Clairton Urban Redevelopment Authority, 402 Pa. 599, 608, 168 A. 2d 134, 138-39 (1961), the Pennsylvania Supreme Court, after an extensive review of the case law, determined the requisites of an attorney's charging lien to be:

> '(1) [T]hat there is a fund in court or otherwise available for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien.'

Here, there is a fund in court created by the efforts of [the attorney] on behalf of [his client]. There is also a contingent fee agreement under which counsel might look to the fund for compensation." 375 A. 2d at 1350.

Though this court has never specified the requisites for enforcement of a charging lien in such a manner, the similarity of the situation makes the *Almi* case persuasive, and certainly Rigby & Thatcher could meet the requirements there set forth.[4]

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4 The appellant makes the argument that the attorney's lien could not be enforced against sums not "recovered," i. e., not actually received by Mrs. Spencer. However, as *Hansborough, Almi,* and other relevant authority makes clear, it is the availability of such a fund for distribution by judicial order that is determinative. As noted previously, the lien here attached to the monies paid into court in no. 20500 pursuant to the settlement. These sums clearly come within the quoted language of I. C. § 3-205.

The concept that an attorney is entitled to assert his lien against the fund which he helped bring into existence has often been recognized. See, e. g., Ryder v. MacKenzie, 235 So. 2d 36 (Fla. App. 1970); In re Estate of Wheeler, 431 P. 2d 608 (Wash. 1967); Owen v. Forchelli, 249 N. Y. S. 2d 913 (1964). See generally, Speiser, Ch. 11; 7 Am. Jur. 2d §§ 339, 343 (1980). Rigby & Thatcher are entitled to determination and enforcement of their lien against such a fund here.

The appellant raises another objection to the procedure followed below; that she was denied a right to a jury trial. The assertion and enforcement of attorney's liens is an equitable exercise. This court recognized the equitable nature of the lien in Nancy Lee Mines, Inc. v. Harrison, 93 Idaho 652, 654-5 (n. 4), 471 P. 2d 39, 41-2 (1970). See also, 7 Am. Jur. 2d § 346 (1980). As such an equitable procedure, it is generally held that these causes are triable to the court. Speiser, *supra*, at § 16.36, p. 400 ("[t]here is no right to a jury trial in the proceeding.") In response to the same demand for a jury, the Missouri appellate court stated in Fein v. Schwartz, 404 S. W. 2d 210 (Mo. App. 1966):

> "The attorney's lien, whether under the statute or at common law, is equitable in its nature. Even decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right, or privilege. . . . But where the thing is not in possession [i. e., is not a retaining lien], and some affirmative action is required by the attorney, he, like other lien claimants, must seek relief in equity. . . . There is no question but that a proceeding such as this one is an equitable one, in that it is triable before a court of equity. . . .

> The instant suit is one in equity in which a trial by jury did not exist at common law and never has as a matter of right in this state." 404 S. W. 2d at 228.

While the court agrees with the argument that the procedure may not be "summary" (see, e. g., Crawford v. Crane, 282 P. 2d 348 (Ore. 1955); Lee v. Lee, 482 P. 2d 745 (Ore. App. 1971) concerning Oregon statutes which allowed such a summary procedure for retaining liens but which were silent as to charging liens), we are unable to agree that a full and fair hearing before a court of competent jurisdiction must be supplemented with a jury before a determination concerning an attorney's lien would be valid. A review of the record indicates that such a hearing (albeit over the appellant's objection) was had here.

Other contentions of the appellant not previously addressed question the factual rulings of the trial court regarding the fees awarded. In light of the discussion above, the court was justified in making these determinations. A review of the record supports the findings and conclusions of the district court since those decisions were based on competent though at times conflicting evidence and are not clearly erroneous. Therefore we will not disturb those determinations. Higginson v. Westergard, 100 Idaho 687, 689, 604 P. 2d 51, 53 (1979); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 578, 513 P. 2d 627, 630 (1973).

The decision of the district court, embodied in the order of March 24, 1978, and the judgment of March 27 of that year, is affirmed.

Costs to respondent. No attorney fees allowed.

BAKES, C. J., DONALDSON and SHEPARD, JJ., concur.

BISTLINE, J. dissenting.

I cannot agree with the majority that the three separate claims of Rigby & Thatcher can properly be brought and pursued to judgment in this single particular enforcement of lien proceeding. To help clarify these rather involved proceedings, I will briefly explain the nature of the three separate claims as they appear to me:

1. *Removal of executor* (Civil No. 4193, Bonneville County, Magistrate Division). As to the removal of the executor and ratification of the children's disclaimers, Rigby & Thatcher had, prior to the exchange of letters re fees with Spencer, filed a petition in the probate proceeding seeking the bank's removal as executor and seeking ratification of the disclaimers. The petition included a prayer for alternative relief, to-wit, that the bank be compelled to bring a shareholder's suit against the Commission Co. These matters were unresolved when the present litigation, seeking enforcement of the attorney's claim of lien, was heard and determined.

2. *Pending suit against the bank and the two Skeltons* (Civil No. 13674, Seventh Judicial District; Supreme Court No. 9899). Spencer initiated this action in 1964 against the bank and the two Skeltons, alleging that her husband's partnership interest in the Idaho Livestock Auction Co. had been sold for an under-value figure. She sought either rescission or damages. This Court had reversed the dismissal and remanded. Spencer v. Spencer, 91 Idaho 880, 434 P. 2d 98 (1967). Trial was set for May 1, 1973, but a settlement was reached without going to trial.

3. *Potential suit against Commission Co.* Mrs. Spencer wanted to obtain some return from her ownership

of stock in the Idaho Livestock Commission Co., an Idaho corporation, and apparently agreed that Rigby & Thatcher would try to compel the bank to bring a shareholder's action for rents and dividends. However, no suit was ever brought against the Commission Co., other than the petition in the probate proceeding to alternatively compel the bank to bring a shareholder's action. No mention was ever made of any separate suit to compel the Commission Co. to buy the stock held by Mrs. Spencer.

As noted by the majority, the settlement that was achieved before trial in Civil No. 13674 resolved both that action and also the Commission Co. dispute, except that Spencer reserved all her claims against the bank. With regard to the majority's discussion of the terms of those agreements, however, I would emphasize that the $150,000 the Commission Co. agreed to pay Mrs. Spencer was both for her stock and for the covenant not to sue, and that no allocation was made between the two. As stated in the agreement:

> "WHEREAS, the parties of this agreement recognize and agree that a stockholders suit for the pursuit of any other claim against Second Party, its stockholders, officers, agents, servants or employees would be expensive, time consuming and would dissipate assets of the said estate and that it is in the best interest of all concerned that Second Party or its nominee acquire said 127½ shares of the capital stock of Second Party, and that First Party be paid for said stock as hereinafter provided for.
>
> "NOW, THEREFORE, it is agreed by and between First Party and Second Party as follows:
>
> "For and in consideration of the premises, and of the payment by Second Party to First Party of the sum of Twenty-Five Thousand Dollars ($25,-

> 000.00), receipt of which is hereby acknowledged, First Party does hereby sell, assign, and transfer to Second Party said 127½ shares of the capital stock of Second Party, free of all liens and encumbrances, and does further covenant and agree that First Party shall not sue or bring action against Second Party or against the following additional parties . . . concerning the subject of this agreement or any other claim now existing, except for breach by Second Party of this agreement or of a separate agreement of this date executed by First Party and Floyd E. Skelton."

The agreement provided for the payment of an additional $125,000 once Spencer had delivered the stock and provided other specified assurances that the agreement was valid and binding. Thus this agreement was both a sales agreement and a covenant not to sue.

With this background, the proper place to begin an analysis of this case is with an examination of the authority for an attorney's charging lien. It is a creature of statute. I. C. § 3-205 provides:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. *From the commencement of an action, or* the service of an answer containing a *counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim,* which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." (Emphasis added.)

By the explicit language of the statute such a lien is limited to those claims placed in litigation. Furthermore, nothing in the statute provides for recovering for services rendered in any other cause or transaction, even

though such cause or transaction occurs at the same time as the litigated claim, or is related to the litigated claim. The lien does not extend to the client's assets, generally, and a "cause of action," other than the one to which the attorney's lien may be said to attach directly, is simply another asset.

Nonetheless, the majority, without even discussing the literal terms of this statute, attempts to justify its holding by resorting to various cases from other jurisdictions. The majority uses *In Re* Abruzzo's Estate, 249 N. Y. S. 72 (1931), as illustrative of their position. The relevant question in that case was whether the attorneys were to be limited in their recovery to the value of the services rendered in connection with the accounting proceeding alone, or whether the lien would also attach to other services in connection with the estate that led to the accounting proceeding. The attorneys in that case had participated in the probate of the will, taken part in two aborted construction proceedings and a successful construction proceeding, and finally in the compulsory accounting which terminated the lawsuit. Each of those steps necessarily followed from the other, and, as stated by that court, a holding denying compensation for all these services "would be little short of an absurdity, since it might result in permitting a recovery for services performed in connection with the accounting proceeding, while denying it in the far more difficult proceeding for a construction of the will which, if not successfully prosecuted, would have precluded the possibility of any recovery by the client on the accounting." *Id.* at 78. The attorneys in that case were faced with a will that their clients challenged: each action they took was in the vertical progres-

sion of steps necessary to challenge that will, and in reality all these steps were simply one overall proceeding.

That is not the situation in the present case, however. First, here we have an award of $5,450, supposedly as earned fee in the probate proceeding, which service was totally unrelated to the litigation in the present case. That suit involved an attempt to remove the bank as executor, and to ratify the disclaimers of the heirs. Neither settlement agreement mentioned or was in any way connected with this endeavor. In fact, both agreements specifically reserved any action Mrs. Skelton might wish to pursue against the bank. Nor was this endeavor part of the contingent fee agreement. Nor was this issue in any way necessary to a culmination or settlement of these other two possible suits, as shown by the fact that this matter was still unresolved when this appeal was brought.

The purpose of a charging lien in favor of an attorney is expressed in Speiser as follows:

> "It is founded on the equity of an attorney to be paid his fees and disbursements out of the judgment he has obtained. It was created to protect the rights of an attorney unable to get possession against a client who seeks to avoid payment for services." 2 Speiser on Attorneys Fees § 16.14 at 381 (1973) (footnotes omitted).

"[T]he agent responsible for the creation of an asset . . . should have security for payment of his fees out of the very monies which would not exist but for his services. It is regarded as an equitable assignment to the attorney of the funds produced by his efforts." Spinello v. Spinello, 334 N. Y. S. 2d 70, 76 (S. Ct. 1972). Rigby & Thatcher here have no claim to a lien for the probate matter, for

the sum recovered bears no relationship to the matter. To extend the lien to this extent is to pervert the very purpose of the lien, *i. e.*, to protect an attorney's fee in a recovered fund.

It must be remembered that the provision for a lien is a special provision where the attorney has recovered a fund for his client. In other cases the attorney is not left without a remedy, but must pursue his claim as any other aggrieved creditor. Secondly, the purported total settlement of all claims, from which the trial court awarded Rigby & Thatcher a percentage fee, included both a sum paid for the *value of the stock owned by Spencer* and the value of her covenant not to sue. I cannot read into I. C. § 3-205 any provision that a lien attaches to the proceeds of a sale of a client's property. Such a sale is not a "cause of action or counterclaim" within the language of the statute. It would be unreasonable to hold that under this statute an attorney who handles the sale of a client's real estate would have a lien attaching to his fee for selling that real estate, yet the majority upholds the giving of a lien to Rigby & Thatcher on the sale of Spencer's stock. Since no allocation was made in the agreement between the value of the stock and the covenant not to sue, it is not proper to validate the whole or any part of that sum in this lien enforcement proceeding.

Aside from *Abruzzo*, annotations and texts, the majority cites three additional cases to support its holding. None of those cases, however, bear a resemblance to this case. In United States v. Preston, 232 F. 2d 77 (9th Cir. 1956), the attorney, at the request of his client, advanced $468.19 as expenses in one suit, the Eleuteria case. The district court ordered this sum paid from monies deposited

in the court's registry from the allotment proceeding, a technically different suit. The court on appeal presumed that the Eleuteria case was in reality a part of the allotment proceeding, that the expenditure in that case was necessary and proper to fully effectuate the judgment of allotment. On this basis the court held that the district court was within its equitable powers to order the $468.19 paid out of the trust funds obtained from the allotment proceeding. Obviously this presumption, that all of the actions taken by the attorneys were necessary and proper to effectuate a final judgment in the principal suit, does not hold in the present case.

In Spinello v. Spinello, 334 N.Y.S. 2d 70 (S. Ct. 1972), the second case cited by the majority, the court held that the lien attached to "the preliminary legal work necessarily entailed in the bringing of" the proceeding. *Id.* at 78. Again, this work could best be described as the "vertical" steps necessary to bring an action, while in the present case there are separate "horizontal" proceedings.

As to the next cited case, Butler v. Breckinridge, 442 P. 2d 313 (Okla. 1967), as I read it that case does not even address the question of applying a lien to more than one suit.

Without belaboring the point by a further detailed summary, each of the cases cited in the annotations and texts is also clearly distinguishable from the present case. To illustrate, the quote from Speiser utilized by the majority cites three cases in addition to *Abruzzo*. Williams v. Kauderer, 165 N.Y.S. 2d 560 (City Ct. 1957), did not involve fees for two actions, it stated only that in addition to the lien attaching to the proceeds of the judgment,

it also attached to proceeds obtained by bringing a proceeding under a statute authorizing an order permitting the debtor to pay the sheriff or judgment debtor. *In Re* Puschall, 10 Wall (U.S.) 483, 19 L. Ed. 992 (1871), dealt with a retaining lien, a lien attaching to monies already in the attorney's hands, not a charging lien. Newbert v. Cunningham, 50 Me. 231 (1863), held only that the attorney's lien extended to suits incidental to enforcing the judgment, that he could enforce his lien by bringing an action against the sheriff for not taking a sufficient replevin bond.

In summary, the courts have held that an attorney's charging lien extends to services he performs that are necessary or incidental to the culmination of the suit which generates the fund, even if those services are not technically part of the principal suit. In so doing the courts have properly refused to elevate form over substance, but in none of those cases have the courts distorted the form and meaning of an attorney's charging lien to the point that it is unrecognizable.

Today's opinion, however, comes close to so doing. I cannot see how these three separate actions—one a probate proceeding, one a suit for rescission or damages, and one not a suit at all, but a sale of stock—can be said to be "suits incident to, or growing out of, the principal object of the employment," as claimed by the majority of this Court. All three of these matters were not necessary to resolve the actual suit that was brought, and to which the lien, by stretching, may be said to attach. Indeed, this case more properly falls within the generally established rule that an attorney's charging lien extends only to fees and disbursements rendered in the particular

action in which they were incurred, and does not cover a general balance due the attorney, or charges rendered in other causes. *See, e.g.*, Regan v. Marco M. Frisone, Inc., 388 N. Y. S. 2d 798 (App. Div. 1976); Collins v. Thuringer, 21 P. 2d 709 (Colo. 1933); S. Speiser, Attorneys' Fees § 16.17 (1973); 7 Am. Jur. 2d *Attorneys at Law* § 285 (1963); Anno., 97 A. L. R. 1133 (1935).

Rigby & Thatcher have thus in effect sought in this ancillary lien foreclosure proceeding to enforce all of their various claims for attorneys' fees claimed against Spencer, even though in reality there are three separate claims.

At best, and as Spencer seems willing to concede, the lien might apply to the $37,500 collected in settlement of No. 13674 (and to whatever portion of the Commission Co. settlement was for the covenant not to sue rather than in payment for the stock). Thus I cannot see this as a claim brought solely in the original action to enforce a lien on that cause of action. Although summarily disposed of by the majority, I believe that the venue issue should control our disposition of this case.

Although I.R.C.P. 12(b)(3) as it first appeared in 1959 in connection with approved form No. 15 may have been thought to provide for dismissal for improper venue, the rule now reads that a motion challenging improper venue shall be considered as a motion for proper venue: "(3) improper venue, which motion shall state the grounds therefore and be considered as a motion for proper venue, but need not be accompanied by an affidavit . . . ." I.R.C.P. 12(b)(3).

I.R.C.P. 40(e) provides:

> "The judge or magistrate may grant a change of venue or change the place of trial to another county

> in any civil action as provided by statute, and the judge or magistrate *must*, on motion pursuant to Rule 12(b), *change the venue* of a trial *when* it appears by affidavit or other satisfactory proof:
>
> "a. That *the county designated in the complaint is not the proper county* . . . ." (Emphasis added.)

Since this is not an action solely to enforce a lien, this action "must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action . . . ." I.C. § 5-404. Since Spencer's allegations that her residence was Twin Falls County are unopposed by Rigby & Thatcher, they must be accepted as true.

Under a similar statutory provision,[1] the Supreme Court of Montana held as follows:

> "Where a defendant, in pursuance of the statute, moves for a change of place of trial upon a ground which entitles him to the change demanded as a matter of right, the court has no option but to grant the motion; its discretion is not invoked. Furthermore, when the movant's papers present such a showing, the court has no right to pass upon any other question in the case. A defendant entitled to have his motion granted has the right to have all other judicial action in the cause determined in the district court of the proper county." Johnson v. Clark, 311 P. 2d 772, 776 (Mont. 1957) (quoting State v. District Court, 240 P. 388, 390 (Mont. 1925).)

---

1 Mont. Code Ann. § 25-2-201 provides that "[t]he court or judge must, on motion, change the place of trial in the following cases:

(1) when the county designated in the complaint is not the proper county."

In Brockman v. Brockman, 171 S. E. 2d 862, 862 (S. C. 1970), the court noted:

> "We have held that where a motion is made for a change of venue on the ground that the named county is the residence of the defendant, and such is not disputed, then a question of law is presented and the decision in the matter is not addressed to the discretion of the trial judge."

In *Brockman,* the action had been brought in Union County. The appellant, in support of his motion for a change of venue, filed an affidavit averring that he was a resident of Spartenburg County. Respondent made no showing disputing appellant's affidavit. The court therefore held that appellant was entitled to trial in Spartenburg County as a matter of law, and ordered that the venue be changed. For other examples of cases holding that a transfer in situations such as this are mandatory, see State v. Sorrell, 504 P. 2d 499 (Ariz. App. 1973); Culligan Soft Water Service v. Berglund, 145 N. W. 2d 604 (Iowa 1966); American State Bank of Dickinson v. Hoffelt, 236 N. W. 2d 895 (N. D. 1975); Schroeder v. Schroeder, 447 P. 2d 604 (Wash. 1968); Andrews v. Cusin, 396 P. 2d 155 (Wash. 1964).

Moreover, if the defendant is entitled to a change of venue on any of the causes of action alleged in the complaint, then a motion for a change of venue must be granted as to all. Archer v. Superior Court, 21 Cal. Rptr. 48, 49 (Cal. App. 1962). *See* Regents of the University of California v. Superior Court, 476 P. 2d 457, 460 n. 8 (Cal. 1970). As noted in Ah Fong v. Sternes, 21 P. 381, 382 (Cal. 1889):

> "Even if the complaint be regarded as stating two separate causes of action, upon one of which the

> defendant would be entitled to a change of venue, but not upon the other, the result would be the same. It is the plaintiff's own doing that the complaint be so drawn. He cannot deprive the defendant of his right to a change of venue by the addition of something to the complaint. If this were not the rule, it would be very easy for a plaintiff to defeat the defendant's right in the matter. All that plaintiff would have to do would be to add another cause of action to his complaint. It need not be a genuine cause of action, and it would not matter whether the two causes of action were properly united or not."

The terms of I.R.C.P. 40(e) governing a change of venue are mandatory. Once an unrebutted showing is made that the defendant resides in a different county, the court must grant a request for a change of venue. Where Rigby & Thatcher have chosen to unite and pursue all of their claims in this particular action, and since the proper venue for some, if not all, of those claims is Twin Falls County, the trial court was bound to grant Spencer's request for a change of venue. I would therefore reverse the judgment and remand with directions that the trial court order a change of venue to Twin Falls County.

In conclusion, I submit that my lack of participation in any of the previous cases which arose after the death of Mr. Spencer and which reached this Court on appeal may allow me to view the issues here in a more detached manner than is so with the other members of the Court. A narrow construction of I.C. § 3-205 would preclude Rigby & Thatcher from any claim of lien—for the simple reason that they were never attorneys appearing in the action which generated the fund against which they assert liens for their various claims. However, other than for Mrs. Spencer's refusal to accept the money—which led

to the suit generating the fund—their lien could and would have attached. I do not think it stretches the language and purpose of I.C. § 3-205 to allow the lien as against those funds directly attributable to the preceding action, which action led to the settlement, and would have led to their being paid if they had not been discharged. Very likely the previous suit which led to the settlement could have been reopened on Mrs. Spencer's reneging and refusing to accept the agreed amount.

What I do apprehend is that the overly broad construction given to I.C. § 3-205 by the Court today may lead to the total loss of the remedial provisions of that statute. It is subject to being classified as special legislation which gives an attorney creditor vastly superior rights to those of a general non-attorney creditor—in particular depriving the alleged debtor of any right to a jury trial.

On the other hand, where the claim of lien is overly broad as against the fund in question, a change of venue and a jury trial would place the statute safely away from critical scrutiny.

APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF IDAHO

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs.

vs.

LOUISE SPENCER,

Defendant-Appellant.

LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, and JANET SPENCER,

Defendants.

MIRIAM SPENCER,

Defendant-Appellant.

IDAHO FIRST NATIONAL BANK
Executor of the Estate of S. R. Spencer, Deceased,

Defendant.

RIGBY, THATCHER & ANDRUS, P.A.,

Claimants-Respondents.

CLERK'S TRANSCRIPT ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville.

HONORABLE WILLARD C. BURTON, District Judge

(Page 4) William S. Holden, Esq., of
HOLDEN, HOLDEN, KIDWELL, HAHN & CRAPO
P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: A/C 208 - 523-0620

Attorneys for Plaintiffs

Case No. 20,500, filed 4:02 P. M.

Dec. 6, 1973

Keith Long, Clerk
by J. Griggs, Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

Civil No.————

COMPLAINT

Fee Category: A
Fee: $27.00

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, An Idaho Corporation.

Plaintiffs

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKING-

TON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased.

Defendants

Come now the plaintiffs, Floyd E. Skelton, and Idaho Livestock Commission Company, and for cause of action against the above named defendants, allege as follows:

COUNT ONE

I

The plaintiff, Idaho Livestock Commission Company, is a corporation organized and existing under the laws of the State of Idaho, and having its principal place of business in Idaho Falls, Idaho. Said plaintiff is hereafter referred to as "Plaintiff Corporation".

II

The defendant, Louise Spencer, is the surviving widow of S. R. Spencer, deceased, who died testate on September 16, 1960. The defendants, LeLand Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, Janet Spencer, and Miriam Spencer, are . . .

(Page 111) IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CASE NO. 20,500

NOTICE OF ATTORNEYS' CLAIM OF LIEN

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER, JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

TO: Holden, Holden, Kidwell, Hahn & Crapo
Attorneys for Floyd E. Skelton and Idaho Livestock Commission Company
P. O. Box 129
Idaho Falls, Idaho 83401

Albaugh, Smith & Pike
Attorneys for The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased
370 "B" Street
Idaho Falls, Idaho 83401

Webb, Pike, Burton and Carlson
Attorneys for Louise Spencer
P. O. Box 33
Twin Falls, Idaho 83301

AND TO THE CLERK OF THE COURT AND TO EACH OF THE PARTIES IN THE ABOVE ENTITLED PROCEEDINGS:

PLEASE TAKE NOTICE that RIGBY & THATCHER, a partnership, and RIGBY, THATCHER & ANDRUS, P.A., each of 25 North Second East, Rexburg, Idaho 83440, hereby claim a lien for attorneys' fees, pursuant

to Idaho Code Sec. 3-205, and according to other applicable principles of law, and in support thereof, respectfully represent as follows:

1. On or about September 16, 1970, Louise Spencer engaged the services of Gordon S. Thatcher, and the firm of which he was a member, RIGBY & THATCHER, Attorneys at Law, Rexburg, Idaho, to represent her in complex matters arising from the (Page 112) estate of her deceased husband, S. R. Spencer.

2. Thereafter Miriam Spencer, on June 1, 1971, Janet L. Spencer, on June 8, 1971, and Alexis Spencer Elkington, on June 7, 1971, confirmed and ratified the right of their mother, Louise Spencer, to represent them in all matters pertaining to their father's estate, and ratified and confirmed to the representation of Rigby & Thatcher in all matters pertaining to the estate.

3. On March 6, 1973, during the course of the representation of Louise Spencer, for herself, and for the others above mentioned, Rigby & Thatcher proposed in writing, under date of March 6, 1973, a specific agreement as to the payment of attorneys' fees and costs in all matters pertaining to the S. R. Spencer estate. A copy of the handwritten proposal, in three pages, is attached hereto as Exhibit A. On March 9, 1973, Louise Spencer approved in writing the proposed agreement as to attorneys' fees, and a copy of the writing, dated March 9, 1973, is attached hereto as Exhibit B. By reason thereof the binding written agreement for the payment of attorneys' fees and costs became effective.

4. Rigby & Thatcher had previously, and thereafter, pursued the legal representation in the S. R. Spencer es-

tate, on behalf of Louise Spencer, and those whom she represented, including but not limited to a proceeding in the S. R. Spencer estate seeking the removal of the Executor and the approval of disclaimer of heirs. A full trial was held in that matter, briefs were filed, and the matter finally submitted to the court for approval.

5. Thereafter the pending lawsuit against Idaho First National Bank, and others, in case No. 13,674, above captioned, came on for trial, and during the course of trial settlement negotiations were undertaken and a written settlement agreement was reached.

(Page 113) 6. In connection with the settlement of case No. 13,674, a settlement was also reached as to prospective litigation involving Idaho Livestock Commission Company, and others.

7. The total agreed cash settlement to be paid by Floyd E. Skelton and Idaho Livestock Commission Company, was $187,500.00.

By virtue of the agreement as to payment of attorneys' fees Louise Spencer, and those whom she represented, became obligated to pay Rigby & Thatcher attorneys' fees in the aggregate amount of $40,625.00, calculated as follows:

Item	Amount
Agreed fee for proceeding for removal of Executor and approval of disclaimer of heirs	$7,500.00
Agreed fee for lawsuit against Idaho First National Bank and others	$5,000.00
Contingent fee of 15% of the agreed settlement of $187,500.00	$28,125.00
Total agreed fee	$40,625.00

Rigby & Thatcher in good faith performed extensive legal services in many complex matters and the total fee, as above outlined, is fair and reasonable considering the extent of the services rendered.

8. In connection with the legal representation Rigby & Thatcher also incurred and disbursed funds for costs, totaling $2,284.75, which are itemized as follows:

Date	Item	Amount
10-16-70	Clark County Sheriff serve Ray Skelton	$ 5.00
12-11-70	Clark County Sheriff balance of billed cost to serve Ray Skelton	1.25
7-21-71	D. R. Telford—Floyd Skelton Deposition	130.00
8-7-72	Harry LeMoyne—expert witness fee	150.00
5-11-73	Harry LeMoyne—expert witness fee	605.00
5-11-73	Charles Appel—expert	
(Page 114)		
5-29-73	Ada County Sheriff	1.65
6-21-73	John Parry, CPA, expert help	335.00
	Total	$2,284.75

9. As a down payment on the settlement of $187,-500.00 the aggrgate sum of $30,000.00 was paid to Rigby & Thatcher and placed in their Trust Account. By agreement with Louise Spencer such down payment was disbursed from the Trust Account as follows:

Date	Item	Amount
5-11-73	Louise Spencer	$10,000.00
5-11-73	Harry LeMoyne	605.00
5-11-73	Charles Appel	1,054.85
5-15-73	Valley Bank (to pay a bank loan of Louise Spencer)	5,737.85
5-30-73	Rigby & Thatcher to apply upon attorneys' fees	5,000.00
6-5-73	Placed in interest bearing savings account	6,000.00
6-21-73	John Parry	335.00
	Balance in regular Trust Account	1,267.30
	TOTAL	$30,000.00

10. Louise Spencer had on October 16, 1970, paid a retainer of $300.00 and on September 15, 1972, had made a further payment, to apply against costs, of $150.00.

11. The following schedule shows the total fee for legal services, the total costs, application of all credits, and the balance owing:

Item		Amount
Total legal fee		$40,625.00
Costs disbursed		$ 2,284.75
	Total	$42,909.75
Total credits		7,444.85
	Balance owing	$35,464.90

12. By virtue of applicable provisions of law Rigby & Thatcher should be authorized to apply the $6,000.00 held in (Page 115) savings, plus interest, and the $1,267.30 held in their Trust Account, to the fee, which credit, when applied against the $35,464.90, would leave a balance owing on the fee of $28,197.60.

13. In addition to the lien on the funds held in trust, Rigby & Thatcher have and claim a lien upon all papers and other items in their possession, and as provided in Idaho Code Sec. 3-205 a lien upon any cause of action of Louise Spencer, and the others whom she represented as above described, with the right to collect the same against any proceeds of any verdict, report, decision, or judgment, in each of the above three described legal proceedings, and the proceeds thereof should be paid to said attorneys, until their lien is satisfied.

14. After the settlement agreements were executed by Louise Spencer, Floyd Skelton and Idaho Livestock Commission Company, and prior to completion of the settlements, Louise Spencer discharged Rigby & Thatcher as her attorneys and has now apparently retained other counsel, but no settlement or resolution has been made as to the fees and expenses owing to Rigby & Thatcher.

DATED this 10th day of February, 1975.

/s/ Ray W. Rigby
/s/ Gordon S. Thatcher

RIGBY & THATCHER

RIGBY, THATCHER & ANDRUS, P.A.
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440

State of Idaho, County of Madison, ss.

Gordon S. Thatcher, being first duly sworn, states under oath that he is one of the claimants in the above entitled claim and makes this affidavit on behalf of Rigby & Thatcher; he has read the foregoing complaint, knows the contents thereof, and . . .

(Page 120) EXHIBIT A

RIGBY & THATCHER
Attorneys at Law
25 North Second East
P. O. Box 437
Rexburg, Idaho 83440
208 - 356-3633

Ray W. Rigby
Gordon S. Thatcher

G. Rich Andrus

Date March 6, 1973

To Mrs. Louise Spencer
3825 South Monaco Parkway
Denver, Colorado 80237

Subject Agreement as to Attorneys Fees

Dear Louise:

To avoid any misunderstanding, I believe we should have an agreement as to our compensation in these various matters:

1. Removal of Executor and Approval of Disclaimer of Heirs. $7,500.00 and if an appeal is taken to the Supreme Court an additional $2500.00. This is regardless of outcome.

2. Pending law suit against Idaho First National Bank, et al. $5,000.00 if resolved at trial stage and an additional (Page 121) (Page two) $2500.00 if involving

an appeal to the Supreme Court, regardless of outcome. Plus an additional fee, contingent on outcome, of 15% of all sums recovered.

3. Potential suit against Idaho Livestock Commission Company. If settled without suit (such as a package settlement of all claims) then 15% of all sums recovered. If a suit is required, then $5,000.00 if resolved at trial stage and an additional $2500.00 if involving an appeal to the Supreme Court, regardless of outcome, plus an additional fee (Page 122) (Page three) contingent on recovery, of 15% of all sums recovered.

Please write me of your acceptance of this arrangement. If there are any questions on it, please call or write.

All of this will be plus actual costs disbursed.

This has already required a tremendous expense and effort on our part with much more required in the future.

It appears you will want a court determination on all of these matters.

Sincerely,

/s/ G. S. Thatcher

(Page 124) EXHIBIT B

3825 S. Monaco Parkway
Denver, Colorado
March 9, 1973

Rigby & Thatcher
Rexburg, Idaho

Dear Gordon,

Thank you for your letters.

I thought your letter to Judge McCoy was excellent. If he refuses to hand down a decision after having received a letter such as this one I strongly urge you to contact the Chief Justice "next week" as you have said was your intent.

The proposed fees are entirely reasonable and acceptable to me.

Sincerely,

/s/ Louise Spencer

(Page 170)

Book 48, Page 883

Terry L. Crapo, of
Holden, Holden, Kidwell, Hahn & Crapo

P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: A/C 208 - 523-0620
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

(Filed January 22, 1976)
Civil No. 20,500

JUDGMENT

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

This cause came on regularly for trial before the Court, sitting without a jury, on September 8, 1975, with each of the parties appearing in person or through their duly appointed and acting attorneys, and the Court having heard the testimony and having examined the proofs and evidence offered by the respective parties, and each of the parties having submitted a brief following the trial, and the Court being fully advised in (Page 171) the premises, and having filed herein its Memorandum Decision dated December 1, 1975, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith,

NOW, THEREFORE, by reason of the law and findings aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED, that Judgment be entered in favor of the above named plaintiffs, as follows:

1. That specific performance of the settlement agreements Dated May 2, 1973, and entitled "Covenant Not to Sue" and "Covenant Not to Proceed Further and Not to Execute", copies of which are attached to the pleadings herein, be, and the same hereby is, granted.

2. That Louise Spencer, and the Executor of the Estate of S. R. Spencer, deceased, and all of the parties claiming an interest in said estate being parties to the within action and before the Court in this proceeding, it is hereby ordered, adjudged and decreed that the sum of $150,000.00 agreed to be paid by the plaintiff, Idaho Livestock Commission Company, under the terms of the "Covenant Not to Sue", dated May 2, 1973, for the said 127½ shares of its common stock fairly represents the fair market value of said shares of stock; that the sale and transfer of said shares of stock are in the best interests of the Estate of S. R. Spencer, deceased, and each person or claimant having an interest in said estate. A copy of the settlement agreement entitled "Covenant Not to Sue", dated (Page 172) May 2, 1973, together with a copy of this Judgment, shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193. Insofar as said 127½ shares of stock of Idaho Livestock Commission Company constitutes an asset of the Estate of S. R. Spencer, deceased, its sale and transfer to the plaintiff, Idaho Livestock Commission Company, is hereby approved, confirmed and ratified, and The Idaho First National Bank, Executor of said estate, is ordered and directed to transfer and deliver its interest in said shares of stock to said Idaho Livestock Commission Company as herein provided.

3. That the plaintiff, Idaho Livestock Commission Company, an Idaho corporation, upon payment of said

purchase price, as herein ordered and directed, is hereby awarded the ownership and title of the 127½ shares of its common stock presently held by the defendant, Louise Spencer and The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, free and clear of all claims of any of the parties to this action. Each and every one of the defendants in this action, and all persons claiming under or through them or any of them are forever barred and foreclosed of all right, title, claim, lien or interest in and to said shares of stock, or any portion thereof.

4. The defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, is hereby ordered and directed to deliver to the Clerk of this Court the certificate or certificates representing the said 127½ (Page 173) shares of common stock of the plaintiff, Idaho Livestock Commission Company, properly endorsed for transfer. The defendant, Louise Spencer, is hereby ordered and directed to execute and deliver to the Clerk of this Court a stock power in the form attached to this Judgment, transferring her interest, if any, in the said 127½ shares of common stock of the plaintiff, Idaho Livestock Commission Company. In the event the defendant, Louise Spencer, shall fail to execute and deliver said stock power to the Clerk of this Court within twenty-one (21) days after this Judgment becomes final, then and in such event the Clerk of this Court is directed to execute said stock power on her behalf, pursuant to the provisions of this Judgment. The Clerk of this Court shall thereupon deliver said endorsed certificate or certificates representing said 127½ shares of common stock and said executed stock power to the plaintiff, Idaho Live-

stock Commission Company, upon the payment by said plaintiff to the Clerk of this Court of the sum of $125,000.00 as provided in paragraph 6 of this Judgment. In the event of the failure of either of said defendants to comply with the provisions of this paragraph, the Court may issue such further protective orders as it shall deem necessary to carry out the terms of this Judgment.

5. With respect to lawsuit No. 13,674, Louise Spencer, et al., plaintiffs, v. Floyd E. Skelton, et al., defendants, Seventh Judicial District Court of the State of Idaho, in and for the County of Bonneville, IT IS ORDERED, as follows:

(Page 174) A. The defendant, Louise Spencer, and the defendants, Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, Janet Spencer, and Miriam Spencer (hereinafter referred to as the "Spencer Children") and any person acting for them or on their behalf or on behalf of the Estate of S. R. Spencer, deceased, are hereby enjoined and prohibited from proceeding further in said pending lawsuit against the plaintiff, Floyd E. Skelton, or any of the following named parties: Floyd E. Skelton and M. R. Skelton, President and Director of Idaho Livestock Auction Company; Floyd E. Skelton and M. R. Skelton, partners of Skelton-Spencer Trading Company; M. R. Skelton, individually; Idaho Auction Company, a corporation; Idaho Livestock Auction, Inc.; Floyd E. Skelton and Leon Skelton, doing business as Idaho Livestock Auction, a partnership; Floyd E. Skelton, doing business as Skelton's Trading Company; and Leon Skelton, individually. Said defendants are further enjoined and prohibited from levying or suing out an execution, attachment or other legal remedy against the plaintiff,

Floyd E. Skelton, and the other above named parties, or in any manner affecting collection on any judgment entered in said lawsuit. This Judgment shall not in any way limit or restrict the right of the plaintiffs in said lawsuit No. 13,674 to continue proceedings therein with respect to the defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased.

(Page 175) B. That the "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973, is a reasonable compromise of disputed claims and is in the best interests of all of the parties to said lawsuit No. 13,674 and all parties appearing in this lawsuit and said settlement is binding upon all of the defendants herein and their born or unborn children. A copy of said settlement agreement, together with a copy of this Judgment, shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193, there to await the further disposition of the assets of said estate in accordance with the orders of this Court. Insofar as said settlement agreement or the claims settled therein, or the payments made thereunder shall constitute an asset of the Estate of S. R. Spencer, deceased, said settlement is hereby approved, confirmed and ratified with respect to the Estate of S. R. Spencer, deceased, and shall be binding upon said estate and all persons claiming an interest therein. This Judgment shall be dispositive of all issues decided therein with respect to the Estate of S. R. Spencer, deceased, or any persons claiming an interest therein.

C. The defendant, Louise Spencer, is obligated to indemnify and hold harmless the plaintiff, Floyd E. Skelton, from any expense, loss, or damage incurred as a

result of any claims or demands made by her, the Executor (Page 176) of the Estate of S. R. Spencer, the "Spencer Children", or by their children, born or unborn, their p sonal representatives, heirs and assigns, or any one acting for, by or through them, concerning the matters set forth in the agreement, including, but not limited to, the said pending lawsuit known as Case No. 13,674.

6. The plaintiff, Idaho Livestock Commission Company, is ordered to pay to the Clerk of this Court the sum of $125,000.00, representing the balance of the payments due under the agreement entitled "Covenant Not to Sue", dated May 2, 1973, and representing the purchase price remaining payable for the 127½ shares of said plaintiff's stock ordered delivered hereunder. The plaintiff, Floyd E. Skelton, is ordered to pay to the Clerk of this Court the sum of $32,500.00, representing the balance of the payments due under the agreement entitled "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973. Said sums shall be held by the Clerk of this Court pursuant to the Order of this Court and said sums shall be divided among the various defendants in this proceeding according to their respective claims and interests as shall be determined by the Order of this Court following a subsequent hearing on the merits of each of said claims.

7. The Clerk of this Court is hereby ordered and directed to pay to the plaintiffs from the sums so deposited with the Clerk of this Court as required in paragraph 6 above, the sum of $16,000.00, representing reasonable attorneys' (Page 177) fees incurred by plaintiffs in this proceeding, together with such additional sum as shall be allowed by the Court as proper costs. All such

attorneys' fees and costs shall be allocated and charged against the respective interests of the defendants in said fund in such manner as shall be determined by the Order of this Court following a subsequent hearing on the manner of allocation of such fees and costs.

RENDERED AND ENTERED this 21 day of January, 1976.

/s/ Willard C. Burton
District Judge

(Page 198) IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12250

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs and Respondents,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants,

LOUISE SPENCER and MIRIAM SPENCER,
Defendants and Appellants.

REMITTITUR

(Filed July 28, 1977)

District Judge Scoggin, (retired) announced the decision in this cause June 27, 1977, to the effect that the

judgment of the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County, is affirmed. Costs to respondents.

IT IS NOW THEREFORE SO ORDERED.

I. R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached and foregoing is a true and correct copy of the opinion filed in the above entitled cause July 20, 1977. and now of record in my office.

WITNESS My hand and the seal of this Court July 20, 1977.

/s/ R. H. Young

(Page 202) Gordon S. Thatcher
of RIGBY, THATCHER & ANDRUS, P. A.
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208 356-3633

Case No. 20500

(Filed August 3, 1977)

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CASE NO. ——

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON,

JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants.

AFFIDAVIT OF GORDON S. THATCHER

STATE OF IDAHO, County of Madison, ss.

GORDON S. THATCHER, having been duly sworn, states under oath as follows:

1. Affiant is a member of the partnership Rigby & Thatcher, and the President of Rigby, Thatcher & Andrus, P. A., a professional corporation, each of 25 North 2nd East, Rexburg, Idaho, and makes this affidavit for and on behalf of such partnership and corporation.

2. On February 13, 1975, a Notice of Attorneys' Lien was filed in the above entitled case pursuant to Idaho Code, Section 3-205.

3. By decision of the Supreme Court of the State of Idaho, filed June 27, 1977, the Supreme Court of the State of Idaho, affirmed the judgment of the above entitled court dated (Page 203) the 21st day of January, 1976, and filed the 22nd day of January, 1976, which judgment granted specific performance of settlement agreements previously made by and between the parties to the above entitled action.

4. Defendants have deposited a sum with the Clerk of the above entitled court, pursuant to and in performance of the settlement agreements made between the above entitled parties and pursuant to the decision of the Supreme Court.

5. The proceeds thus deposited are subject to the lien of Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., for payment of their attorneys' fee as set forth in the Notice of Attorneys' Claim of Lien.

6. Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., are entitled, pursuant to the legal services rendered on behalf of Louise Spencer, Alexa Spencer Elkington, Janet Spencer and Miriam Spencer, the agreements for compensation made between Louise Spencer and Rigby & Thatcher, and the attorneys' lien granted pursuant to Idaho Code, Section 3-205, for the legal services thus rendered, to an order of the court authorizing and directing the Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for Bonneville County to retain from the proceeds deposited with said clerk by defendants pursuant to the settlement agreements made by and between defendants and plaintiffs referred to above, a sum of $28,197.60; authorizing and directing said Clerk to pay directly to Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., the sum of $28,197.60 from the proceeds deposited with said Clerk and authorizing them to apply the $1,267.30 in trust account of Rigby & Thatcher referred to in the Notice of Attorneys' Claim of Lien, and $6,000.00 plus interest in a trust savings account of Rigby & Thatcher, a partnership, to the outstanding balance owing on the attorneys' fee of said partnership; thus constituting a total payment of attorneys' fee from the proceeds to be paid from the sums in Court, and in (Page 204) the trust accounts of Rigby & Thatcher, the sum of $35,464.90, plus interest on the savings account.

7. Because said Clerk of the District Court is in need of immediate authorization as to the handling of the funds subject to the attorneys' lien, Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., are entitled to an immediate order of the court making provision as herein requested and granting any of the interested parties above named an opportunity to appear and show cause why any of the provisions of said order should be modified or rescinded.

DATED this 2nd day of August, 1977.

/s/ Gordon S. Thatcher

SUBSCRIBED AND SWORN To before me this 2nd day of August, 1977.

/s/ ————————
Notary Public for Idaho
Residing at: Rexburg, Idaho
My Commission is for life.

(Page 205) Gordon S. Thatcher
of RIGBY, THATCHER & ANDRUS, P. A.
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Phone 208 356-3633

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CASE NO. ——

Book 081 Page 724

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants.

ORDER AND ORDER TO SHOW CAUSE

(Filed August 3, 1977)

On reading the affidavit of Gordon S. Thatcher, dated August 2, 1977, on file herein, good cause appearing therefore:

IT IS HEREBY ORDERED, that the Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for Bonneville County retain from the proceeds deposited with said Clerk by the above named defendants pursuant to the settlement agreements made by and between defendants and plaintiffs, a sum of $28,197.60; that said Clerk shall pay directly to Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., the sum of $28,197.60 from the proceeds deposited with said Clerk; that Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A., are hereby authorized to apply the $1,267.30 held in their trust account and $6,000.00 plus interest in their trust savings account to the outstanding

balance owing on attorneys fees to Rigby & Thatcher, a partnership, and Rigby, Thatcher & Andrus, P. A.

(Page 206) IT IS FURTHER ORDERED that defendants or plaintiffs may appear before this court in the District Courtroom of the Bonneville County Courthouse, in Idaho Falls, Idaho, on the 24th day of August, 1977, at 10:00 A. M., to show cause why any portions of this order should be modified or rescinded.

AND IT IS FURTHER ORDERED, that a copy of this order be served on the above named parties at least 5 days prior to the hearing and that mailing of such notice to the parties or their respective attorneys of record shall be deemed sufficient notice.

ORDERED This 2 day of August, 1977.

/s/Willard C. Burton
District Judge

(Page 207) Webb, Burton, Carlson & Pedersen
Attorneys at Law
Bank of Idaho Building
Box 33
Twin Falls, Idaho 83301

734-4450

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Case No. 20-500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

MOTION TO STRIKE ORDER AND RESPONSE TO ORDER TO SHOW CAUSE

(Filed August 15, 1977)

Louise Spencer and Miriam Spencer, defendants herein, now move the Court to strike the Order of August 2, 1977, relating to attorneys' fees for the law firm of Rigby, Thatcher and Andrus, and responds to the Order to Show Cause therein contained by stating that she resists any claim for attorneys' fees by Rigby, Thatcher and Andrus, and resists any proceedings for the collection of attorneys' fees in connection with this action, except for the preservation of attorneys' lien as to the funds on deposit with the Clerk of the Court in this matter.

This Motion to Strike and this Response is supported by the Affidavit of Louise Spencer, filed contemporaneously herewith.

ORAL ARGUMENT IS REQUESTED.

Dated this 12th day of August, 1977.

(Page 208) Webb, Burton, Carlson & Pedersen

By /s/ Lloyd J. Webb
Attorneys for Defendants Louise
Spencer and Miriam Spencer

CERTIFICATE OF MAILING

LLOYD J. WEBB, a resident attorney, hereby certifies that on the 12th day of August, 1977, he served the foregoing Motion to Strike Order and Response to Order to Show Cause upon the following by mailing copies thereof to them:

Hopkins and French
P. O. Box 1196
Idaho Falls, Idaho 83401

Albaugh, Smith, Pike & Martin
P. O. Box 428
Idaho Falls, Idaho 83401

Holden, Holden, Kidwell, Hahn & Crapo
P. O. Box 129
Idaho Falls, Idaho 83401

Rigby, Thatcher and Andrus
P. O. Box 250
Rexburg, Idaho 83440

/s/ Lloyd J. Webb

(Page 209) Webb, Burton, Carlson & Pedersen
Attorneys at Law
Bank of Idaho Building
Box 33
Twin Falls, Idaho 83301
734-4450

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Case No. 20,500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

AFFIDAVIT CONCERNING CLAIM FOR ATTORNEYS' FEES BY RIGBY, THATCHER AND ANDRUS

STATE OF IDAHO, County of Twin Falls, ss.

LOUISE SPENCER, being first duly sworn, deposes and states the following with regard to the claim of Rigby, Thatcher and Andrus for attorneys' fees in connection with this matter:

I.

The affiant emphatically resists the request of Rigby, Thatcher and Andrus for fees, and in particular for fees in connection with this action, as a part of the distribution of the funds in this action.

(Page 210)

II.

The affiant believes that she has a good and sufficient defense against the claim of Rigby, Thatcher and Andrus for at least the following reasons:

A. The claimed contingent fee does not apply to the bulk of the funds involved.

B. Part of the claim for fees includes $7,500 for proceedings to remove the executor in the matter of the estate of Stanley Spencer, deceased, which procedure is not complete and which fee has not been earned.

C. The claim itself is not broken down or specified and the affiant believes that much or all of the claim for fee is unjustified in view of the circumstances of the case.

III.

The affiant believes that she is entitled to defend any claim for fees against her and that any action for fees would have to be brought in a separate claim in the forum of the affiant's present residence, Twin Falls County, Idaho, where she would be entitled to jury trial and where she would be entitled to a full presentation of the claim both procedurally and factually and be entitled to assert her defenses to the claim.

IV.

The affiant emphatically resists any attempt to collect funds associated with the claim for attorney's fees from funds delivered into court in this matter for the reasons specified and for other reasons.

/s/ Louise Spencer

SUBSCRIBED AND SWORN to before me this 10th day of August, 1977.

/s/ _____
Notary Public
Residence: Twin Falls, Id.

(Page 213) Book 081, Page 875

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

FLOYD E. SKELTON, et al.,
Plaintiff,

vs.

LOUISE SPENCER, et al.,
Defendant.

COURT MINUTES

Case No. 20500

DATE: August 24, 1977
APPEARANCE:
PLAINTIFF:
DEFENDANT:

Defendant's motion to strike the Order To Show Cause came on for hearing this day before the Honorable Willard Burton, District Judge, sitting in Open Court at Idaho Falls, Idaho. Ross Oviatt, Court Reporter, and Sandy Grover Deputy Court Clerk, were present.

Mr. Loyd Webb, appearing on behalf of Louise Spencer, presented arguments in favor of the motion. Mr. Art Smith appearing on behalf of Idaho First National Bank, made a demand for jury trial on this matter. Mr.

Tim Hopkins, appearing on behalf of children of defendant, addressed the Court. The firm of Rigby, Thatcher, and Andrus appeared on behalf of plaintiff, and presented arguments to the Court.

Court, after hearing evidence presented, denied the motion to strike, and also denied the demand for a jury trial. Court further ordered this matter be set for October 21, 1977. By stipulation of counsel, the monies held in trust by the Court, are to be invested in the Idaho First National Bank, but are still held by the Court. This for the purpose that the money may be drawing interest.

Court was thus adjourned.

APPROVED:

/s/ Willard C. Burton
District Judge

(Page 214) Book 081, Page 954

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Case No. 20,500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

ORDER DENYING MOTION TO STRIKE AND RESETTING HEARING ON FORECLOSURE OF ATTORNEYS' LIEN

(Filed August 30, 1977)

THIS MATTER having come on regularly for hearing in the above Court before the Honorable Willard C. Burton, District Judge, upon the MOTION TO STRIKE and RESPONSE TO ORDER TO SHOW CAUSE of Louise Spencer and Miriam Spencer and upon the ORDER TO SHOW CAUSE heretofore entered by the Court, Louise Spencer and Miriam Spencer appearing by their attorney of record, Lloyd J. Webb; Leland Spencer, Carmen Jensen, Alexa Elkington, and Janet Spencer appearing by their attorney of record, Timothy Hopkins; the Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, appearing by its attorney of record, A. L. Smith; and the Lien Claimants, Gordon S. Thatcher, Roy Rigby, and Rich Andrus, appearing in person and as agents of their professional corporation, and the Plaintiffs appearing not, in person or by counsel, and the matter having been argued by (Page 215) all counsel and the Lien Claimants, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Motion of Louise Spencer and Miriam Spencer to Strike the previous Order to Show Cause is denied.

2. The hearing on the ORDER TO SHOW CAUSE why the attorneys' fees of Rigby, Thatcher, and Andrus should not be fixed and their attorneys' lien foreclosed and paid from funds in this action held by the Clerk of

the above Court is hereby continued and reset in the Courtroom of the above Court in the Bonneville County Courthouse, Idaho Falls, Idaho, on October 21, 1977, at 10 a.m., of said day.

3. All interested parties are permitted to file herein prior to said hearing affidavits setting forth said issues of law and/or fact as they deem material to a decision on the merits in this proceedings, and such briefs may be filed with the Court as the parties desire. Evidence, both documentary and testimonial, may be adduced by any party at the hearing.

4. The monies held by the Clerk of the Court in this case shall be by him deposited in the Idaho First National Bank, Idaho Falls, Idaho, at interest in a 60-day time certificate, or equivalent bank deposit.

Done and dated this 25 day of August, 1977.

/s/ Willard C. Burton
District Judge

(Page 216)

WEBB, BURTON, CARLSON & PEDERSEN
Attorneys at Law
Bank of Idaho Building
Box 33
Twin Falls, Idaho 83301

734-4450

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

• • • • •

Case No. 20,500

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants.

RESPONSE TO CLAIM FOR ATTORNEY'S FEES BY GORDON S. THATCHER.

• • • • •

(Filed October 18, 1977)

The defendants Louise Spencer and Miriam Spencer, responding to the Affidavit of Gordon S. Thatcher, as if that Affidavit constituted a claim for relief, allege:

I.

The answering defendants deny that the allegations stated constitute a claim upon which relief may be granted, they deny that any cognizable claim has been made against them for the requested attorney's fees, they assert that if a cognizable claim has been made, that the venue of that claim should be in the residence of the defendants in Twin Falls County, Idaho, and they assert that any such claim must be by independent civil action and not as a part of the above entitled action, and for these and other legal reasons, they pray the dismissal of the claim of Gordon S. Thatcher.

(Page 217) II.

The answering defendants deny each and every allegation contained in the Affidavit, not specifically set out herein.

III.

The answering defendants admit the allegations contained in paragraphs 1 and 2 of the Affidavit, though they deny the legal sufficiency of any Notice of Attorney's Lien filed in this action.

IV.

Responding to the allegations contained in paragraph 3 of the Affidavit, the answering defendants admit that a decision of the Idaho Supreme Court has been entered, affirming the Judgment entered in this matter, but they deny the affiant's characterization of that Judgment and they affirmatively allege that Louise Spencer has caused to be filed with the United States Supreme Court a Petition for Certiorari, requesting the review of the decision of the Idaho Supreme Court. It is believed that that Petition will be docketed in the Office of the Clerk of the United States Supreme Court on the 17th day of October, 1977.

V.

The answering defendants deny the allegations contained in paragraph 4 of the Affidavit.

VI.

Responding to the allegations contained in paragraph 5 of the Affidavit, the answering defendants deny that

the defendants have deposited any sums with the Clerk of the above entitled Court, but as to sums deposited by the plaintiffs, the answering defendants deny that those sums are subject to the lien claimed.

VII.

Responding to the narrative language of paragraph 6 of the Affidavit, the answering defendants allege:

(Page 218) (a) The answering defendants deny that the affiant and the law firm of which he is a member are entitled to any Order of the Court directing the payment of sums from monies deposited with the Clerk by the plaintiffs to that law firm by reason of any agreements or otherwise.

(b) The answering defendants specifically deny the claim of the affiant and the law firm of which he is a member to the sum of $28,197.60.

(c) The answering defendants deny the statement that the Court should authorize the Clerk to pay that sum, or any other sum, to the affiant or the law firm of which he is a member.

(d) The answering defendants deny that the Court should authorize the affiant and the law firm of which he is a member to pay any sums from trust accounts or trust savings accounts held by them to them, pending disposition of this action.

(e) The answering defendants deny that the total sum payable the affiant and the law firm of which he is a member is the sum of $35,464.90, plus interest.

VIII.

The answering defendants deny the allegations contained in paragraph 7 of the Affidavit.

AFFIRMATIVE DEFENSES.

IX.

The answering defendants allege that the proper venue of this case is in Twin Falls County, Idaho, and not in Bonneville County, Idaho.

X.

The answering defendants allege that no action is cognizable in this case, as concerns the claim of the affiant and his law firm for attorney's fees, and that any such claim must be made by separate claim for relief in a separate law suit.

(Page 219) XI.

The answering defendants allege that this action is barred by the Statute of Limitations, as set out at 5-217, Idaho Code.

XII.

The answering defendants specifically allege that any claim by the affiant and the law firm of which he is a member against these answering defendants would be limited to the agreed contingent fee of $5,000.00, plus 15% of the recovery in the suit, which recovery was the sum of $37,500.00. The $7,500.00 claimed in connection with the removal proceedings directed against the Per-

sonal Representative of the estate is unearned, because those removal proceedings have never been completed.

WHEREFORE, The answering defendants pray that the affiant and the law firm of which he is a member take nothing by reason of their Affidavit, that this action be dismissed and that the answering defendants be awarded their attorney's fees incurred in the defense of this claim.

Webb, Burton, Carlson & Pedersen
By /s/ Lloyd J. Webb
Attorneys for the Defendants
Louise Spencer and Miriam Spencer.

DEMAND FOR JURY TRIAL.

The answering defendants demand jury trial of all issues presented by the Affidavit and this Response thereto.

Webb, Burton, Carlson & Pedersen
By /s/ Lloyd J. Webb
Attorneys for the Defendants
Louise Spencer and Miriam Spencer.

(Page 234)

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR COUNTY OF BONNEVILLE

Case No. 20,500

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION, an Idaho Corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKING-

TON, JANET SPENCER, MIRIAM SPENCER, and IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

JUDGMENT FOR ATTORNEYS' FEES

(Filed March 28, 1978)

On March 24, 1978, the court issued "Order Granting Attorneys Fees", containing findings of fact and conclusions of law. To enter judgment, the court supplements the findings of fact as follows:

1. Under the fee agreement between Louise Spencer and Gordon S. Thatcher, the attorneys were also to receive $7500.00 for services concerning removal of executor and approval of disclaimer of heirs. While the attorney's work was substantially completed on that matter, a court decision was not reached prior to the settlement involved in this suit. Louise Spencer has paid a total of $5450.00 to her attorneys, which the court deems a proper settlement for that $7500.00, considering the decision had not been reached by the court.

2. Rigby & Thatcher hold in trust $8866.17 to apply against the fees.

The court concludes that Rigby & Thatcher are entitled to recover the judgment herein provided.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Rigby & Thatcher are entitled to and are hereby granted judgment for $33,125.00, to be recovered and collected as follows:

(Page 235) 1. $8866.17 by withdrawing and applying upon the judgment that sum, together with accruing interest, which they hold in a trust account.

2. $24,258.83 to be paid to them from the funds held by the Clerk of the Court in this action, together with interest thereon at 8% per annum from date hereof until paid. The Clerk of the Court is directed to pay over that sum from the funds held by the clerk to Rigby & Thatcher.

ORDERED this 27th day of March, 1978.

/s/ Willard C. Burton

District Judge

(Page 236) IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

No. 20500

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION, an Idaho Corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

ORDER GRANTING ATTORNEY FEES
(Filed March 29, 1978)

This case is presently before the court pursuant to an "Order To Show Cause" obtained by the law firm, Rig-

by, Thatcher and Andrus, requiring that the amount of attorney fee to which they were entitled be determined and that it be paid out of monies held by the clerk and in trust by the attorneys or in lieu thereof that parties objecting thereto appear and show cause why it should not be done.

Louise Spencer and Miriam Spencer have responded to the order and have appeared for hearing thereon. It is their initial contention that the relief sought by the attorneys cannot be had in this action but must be by a separate action. They also insist upon their right in such a separate action to a jury trial. They cite cases which hold that an attorney may, properly, bring a separate action for his fees and that under some circumstances a separate action might be the better method. Numerous cases, however, hold that the attorney's right to his fee and an attorney's lien may be enforced in the original action. That is what attorneys in this case have chosen to do and the court upheld their right to do so.

At the trial of the cause attorney's right to a fee was disputed as was the amount thereof. The court finds:

(Page 237) 1. Louise Spencer entered into an agreement with Gordon Thatcher, early in the progress of the proceedings undertaken by him, that he should be paid a fee of $5,000.00 plus 15% of all sums recovered.

2. The suit was settled by an agreement between the parties that the sum of $187,000.00 be paid in settlement of the claims presented by the attorney.

3. The parties intended when the agreement was made that the 15% contingency payment should apply to the entire amount recovered and not to just that part of

the recovery above a sales price that had been previously offered.

4. The attorneys are entitled to a fee of $5,000.00 plus 15% of the sum of $187,000.00 and they may have their fee satisfied out of monies held in trust by them and from the interest of Louise Spencer in monies held by the clerk of the court.

Done this 24th day of March, 1978.

/s/ Willard C. Burton

District Judge

IN THE SUPREME COURT OF THE STATE OF IDAHO

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER and MIRIAM SPENCER,

Defendants-Appellants,

LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, and JANET SPENCER, and IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants,

RIGBY, THATCHER & ANDRUS, P. A.,

Claimants-Respondents.

REPORTER'S TRANSCRIPT ON APPEAL

Trial at Idaho Falls, Bonneville County, State of Idaho, December 14, 1977, at 10:00 a.m. before Willard C. Burton

For the Defendant-Appellant:	Lloyd J. Webb, Esq., Twin Falls, Idaho
For the Defendants, Leland, Carmen, Alexa and Janet Spencer:	Gregory L. Crockett, Esq., Idaho Falls, Idaho
For the Defendant, Idaho First National Bank:	A. L. Smith, Esq., Idaho Falls, Idaho
For the Claimants-Respondents:	G. Rich Andrus, Esq., Rexburg, Idaho

and the following proceedings were had and made a matter of record:

The Court: This is the case of Louise Spencer versus Leland Spencer and the Livestock Company, several of them.

Mr. Webb: Yes, 20,500 is the case number, your Honor, Skelton versus Spencer.

The Court: No, this is 13,674.

Mr. Smith: That would be the wrong one, your Honor, 20,500.

The Court: 20,500, Floyd Skelton and others versus Louise Spencer, is that it?

Mr. Smith: That is the one.

Mr. Webb: Correct.

The Court: Okay, and as nearly as I can remember, it is before the Court this morning on a motion for attorneys' fees, is that correct?

Mr. Webb: That is correct.

Mr. Thatcher: That is correct.

The Court: And the motion is made, I believe, by Mr. Rigby and Mr. Thatcher and they are here.

Mr. Andrus: That is correct.

Mr. Webb: Preliminary to the hearing on the motion I would like to make the record clear that earlier this fall on behalf of Mrs. Spencer we addressed arguments to the Court relating to the merits of this matter and the procedural aspects and we want the record to be clear that we do not in any way waive our claims which were basically three: one, that this is not an appropriate procedural vehicle for the disposition of this claim. An independent suit would have to be filed. Two, that the venue is not correct. Mrs. Spencer is a resident of Twin Falls County and it is not appropriate to hear this case in Bonneville County. Thirdly, that a jury demand has been made. We realize that the Court has denied that request, but we want the record to show that we believe that the case is appropriate for disposition upon a jury demand, and, by jury, I might address the Court of the fact also that in the interim since the last hearing a petition for writ of certiorari has been directed to the Supreme Court of the United States. This is pending at this time on the merits of this case, 20,500. No action has been taken by the United States Supreme Court. I will, however, advise the Court we have not applied for a Stay order and none has issued in that matter. So, as far as any stay being in existence, none is in existence at this time, but I did want the record to be clear that that petition for certiorari is pending. For those reasons, of course, and for the record, we do object to this matter being heard at this time.

The Court: All right, of course, those objections have been presented to the Court before and have been ruled upon and the Court has ruled against you and the rule of the . . .

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 12969

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs,

vs.

LOUISE SPENCER,

Defendant-Appellant,

LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, and JANET SPENCER.

Defendants.

MIRIAM SPENCER,

Defendant-Appellant,

IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendant.

RIGBY, THATCHER & ANDRUS, P. A.,

Claimants-Respondents.

BRIEF

". . . A client who would otherwise be entitled to a trial by jury cannot be deprived of such right by his attor-

> neys' proceedings to impress a lien on certain property."

For this Rule see *In Re Sebring,* 264 N. Y. S. 379 (1933). This whole subject is explored at length in the Utah case of *Midvale Motors, Inc. v. Saunders,* supra. The Court there concludes that the lien given attorneys to secure their fees is merely a device to protect the attorney and carries with it no special procedure for the enforcement of the lien. The conclusion reached by the Utah Court is thusly set out:

> "While there is authority to the effect that an attorneys' lien on property recovered in an action may on application to the Court be enforced in the original matter (see 7 Am. Jur. 2d, Attorneys at Law, § 302), we think the better rule, in the absence of special circumstances requiring a contrary holding to prevent injustice, is to require counsel to bring a separate action against his client to determine the amount of the fee and to foreclose his charging lien if any he has."

Essentially the same conclusion is reached in *Lee v. Lee,* supra.

The procedural infirmities in this action were:

(a) An independent action was required by law —none was prosecuted;

(b) The action should have been required to be instituted in the appropriate venue—this action was prosecuted in an inappropriate venue;

(c) Appropriate pleadings should have been required of the claimant so that the defendant would have an opportunity to make appropriate response thereto—no such pleadings were here required or presented;

(d) When a jury demand was made, a jury trial should have been given—a demand was made in this case, but no jury trial was given the defendants.

For these reasons alone, the claim of the attorneys should have been denied and they should have been required to prosecute any claim they had in an appropriate separate and independent action in the proper venue and with a jury.

B. *The Attorneys' Fee Claim*:

(1) The claim for fees for the prosecution of the action concerning the sale of the auction company:

The claim for attorneys' fees rests upon a letter dated March 6, 1973, handwritten by attorney Gordon Thatcher. The significant language follows:

> "2. Pending lawsuit against Idaho First National Bank, et al. $5,000 if resolved at trial stage and an additional $2,500 if involving an appeal to the Supreme Court, regardless of outcome. Plus an additional fee, contingent on outcome, of 15% of all sums recovered."

It was alleged by the attorneys that the "pending lawsuit" had reference to the suit against the executor and against Skelton in connection with the sale of the Auction Company and that upon its settlement the attorneys became entitled to $5,000.00 plus 15% of $187,500.00, the total sum paid by Skelton in connection with the "settlement" of May, 1973. Louise Spencer and Miriam Spencer, however, argued that even if the contingent fee were otherwise payable, the contingency would certainly not apply to that part of the amount paid by Skelton representative of the purchase of shares of stock owned by Louise Spencer, and arguably by the estate, in the . . .

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No. 81-92

In The

Supreme Court of the United States

October Term, 1981

LOUISE SPENCER AND MIRIAM SPENCER,
Petitioners,

vs.

RIGBY, THATCHER & ANDRUS, P.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Were federal constitutional issues raised in the state court proceedings, so as to support certiorari under 28 U.S.C. § 1257 (3), when Petitioners relied solely on state law in asserting improper procedure, a right to change venue, and a right to a jury trial, and made no mention below of Amendment 14, nor any other provision, of the United States Constitution?

2. Are there substantial federal constitutional issues of equal protection or due process of law, under United States Constitution, Amendment 14, involved in the state court proceedings, wherein:

A. Respondents, as former attorneys for Petitioners, were permitted to intervene in an existing action to foreclose an attorneys' charging lien against a fund on deposit in court, representing proceeds of a settlement achieved through the efforts of the attorneys in two related court proceedings?

B. Petitioners' objection to venue was denied consistent with state law applying residence at the commencement of an action as determining venue?

C. The case was tried to the court because no right to a jury trial exists under state law in an equitable lien foreclosure proceeding?

LIST OF PARTIES

Floyd E. Skelton and *Idaho Livestock Commission Company,* an Idaho Corporation, are the Plaintiffs in this action, No. 20,500, Seventh District, Bonneville County, Idaho. They were Respondents on the first appeal of Case No. 20,500, to the Supreme Court of the State of Idaho, and on the first Petition for Writ of Certiorari to this court, *Skelton v. Spencer,* 98 Idaho 417, 565 P. 2d 1374 (1977), *cert. den.* 434 U. S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978). They successfully pursued a claim for specific performance of settlement agreements, and following the decision of the Supreme Court of the State of Idaho, affirming the District Court judgment, they paid the settlement amount into Court and received their consideration for the setlement paid. They were served with the claim in intervention brought by Rigby, Thatcher & Andrus, but did not take part in the trial nor appeal to the Supreme Court of the State of Idaho as to the intervention claim, nor are they involved in the Petition for Certiorari now under consideration.

Louise Spencer and *Miriam Spencer* are original Defendants in Case No. 20,500. They defended in the trial involving specific enforcement of the settlement agreements, were Appellants in the appeal to the Supreme Court of the State of Idaho, and were the Petitioners in the unsuccessful Petition for Certiorari to the Supreme Court of the United States. They defended in the trial in District Court against the claim in intervention brought by Rigby, Thatcher & Andrus, were Appellants on the appeal of the court decision to the Supreme Court of the State of Idaho, *Skelton v. Spencer,* 102 Idaho 69, 625 P. 2d

1072 (1981), and are Petitioners for certiorari in this proceeding. Louise Spencer is the widow, and Miriam Spencer one of the children of S. R. Spencer, Deceased.

Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, and *Janet Spencer* were original Defendants in Case No. 20,500, but in the original trial did not oppose, but supported, specific performance of the settlement agreements. They were not involved in the appeal to the Supreme Court of the State of Idaho, nor the Petition for Certiorari as to specific performance of the settlement agreements. They defended in the trial in District Court, against the claim in intervention brought by Rigby, Thatcher & Andrus, but were not involved in the appeal from the decision of the District Court to the Supreme Court of the State of Idaho, and they are not involved in the Petition for Certiorari herein. They are the only other children and heirs of S. R. Spencer, Deceased.

Idaho First National Bank, As Executor of the Estate of S. R. Spencer, Deceased, is one of the original Defendants in Case No. 20,500, brought in District Court. The Bank defended against specific performance, but did not take part in the appeal to the Supreme Court following the District Court decision specifically enforcing the settlement agreements, nor were they involved in the Petition for Certiorari before this court. The Bank did defend against the claim in intervention brought by Rigby, Thatcher & Andrus, but were not involved in the appeal to the Supreme Court of the State of Idaho, following the District Court decision in favor of Rigby, Thatcher & Andrus, nor are they involved in the Petition for Certiorari before this court.

Rigby, Thatcher & Andrus, P.A., brought a claim in intervention in this proceeding, immediately following the decision of the Supreme Court of the State of Idaho, affirming specific enforcement of the settlement agreement becoming final, seeking to foreclose an attorneys' charging lien against the funds on deposit in District Court, and serving all other parties named herein. Following the decision of the District Court in their favor, they were Respondents on the appeal by Louise Spencer and Miriam Spencer, to the Supreme Court of the State of Idaho, and are Respondents to the Petition for Certiorari at issue here.

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No. 81-92

In The

Supreme Court of the United States

October Term, 1981

LOUISE SPENCER AND MIRIAM SPENCER,

Petitioners,

vs.

RIGBY, THATCHER & ANDRUS, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The judgment of the District Court, Bonneville County, Idaho, of January 21, 1976, in Case No. 20,500, Pet. App. 44-50, specifically enforced settlement agreements and ordered that the balance of the settlement price to be paid by Idaho Livestock Commission Company and Floyd E.

Skelton, aggregating $157,500.00, would be held by the court for distribution following a subsequent hearing on the merits of claims of the parties to the funds.

The decision of the Supreme Court of the State of Idaho, affirming the judgment of the District Court of January 21, 1976, is reported as follows:

> *Skelton v. Spencer*, 98 Idaho 417, 565 P. 2d 1374 (1977), *cert. den.* 434 U. S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978).

The decisions of the District Court, Bonneville County, Idaho, of March 24 and 27, 1978, in Case No. 20,500, Pet. App. 70-73, awarded attorneys fees on the claim in intervention by Rigby, Thatcher & Andrus, in foreclosure of their attorneys' charging lien on the funds on deposit in District Court.

The decision of the Supreme Court of the State of Idaho which affirmed the award of attorneys fees to Rigby, Thatcher & Andrus, from the fund on deposit in the court, Pet. App. 1-31, is officially reported as follows:

> *Skelton v. Spencer*, 102 Idaho 69, 625 P. 2d 1072 (1981).

OBJECTION TO JURISDICTION

Petitioners assert that this court has jurisdiction under 28 U. S. C. § 1257 (3).

Respondents object to the jurisdiction of the court to grant the writ of certiorari, under the statute, for the reason that the federal questions raised here were not raised during the state court proceedings.

STATEMENT OF THE CASE

Petitioners Louise Spencer and Miriam Spencer, her daughter ("Spencers"), seek review of a decision of the Supreme Court of Idaho, which affirmed an award to Respondents Rigby, Thatcher & Andrus, P.A. ("R. T. & A.") of $24,258.83 from a fund of $157,500.00 on deposit in Case No. 20,500, District Court, Bonneville County, Idaho, and $8,866.17 from funds held in trust by R.T. & A., in foreclosure of an attorneys' charging lien. Pet. App. 8-9. The court fund was the balance of a $187,-500.00 package settlement reached by Spencers, through legal services of R. T. & A., with Floyd Skelton ("Skelton") and Idaho Livestock Commission Company ("Commission Co.") on May 2, 1973. Pet. App. 5-6. The sum of $8,866.17, held in trust by R. T. & A. was the balance of a down payment on the settlement. Pet. App. 8.

After Spencers received the $30,000.00 down payment on the $187,500.00 settlement, they refused, in July 1973, to honor the settlement and discharged R. T. & A. as their attorneys. Pet. App. 6.

On December 6, 1973, Skelton and Commission Co. brought suit in District Court, Case No. 20,500, Bonneville County, Idaho against Spencers, and also against Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, and Janet Spencer, all other children and heirs of S. R. Spencer, Deceased and Louise Spencer, his widow ("Spencer Children"), and the Idaho First National Bank as Executor of the Estate of S. R. Spencer, Deceased ("Executor Bank"). Pet. App. 33-34. The suit sought specific performance of the two settlement agreements

involved in the settlement of $187,500.00, and sought a determination of all claims of all defendants to the balance of the settlement proceeds. Pet. App. 6.

One settlement agreement was with Skelton, calling for him to pay $37,500.00 to Spencers in full settlement of all claims by Spencers against Skelton, and Skelton's interests, as raised in a legal action brought in District Court, Bonneville County, Idaho, in 1964, under Case No. 13,674. The suit alleged damages in a sale by the Executor Bank to Skelton of an interest of S. R. Spencer, who died in 1960, in certain livestock auction enterprises in Idaho Falls, Idaho. The suit was not settled as to the Executor Bank. Pet. App. 2-3, 5-6. R. T. & A. represented Spencers in that suit, commencing in 1970. Pet. App. 3-4.

The second settlement agreement involved a potential shareholders' action against the Commission Co. to recover the value of the Estate shares in that company including damages for non-payment of dividends since the death of S. R. Spencer some 13 years previously. R. T. & A., as attorneys for Spencers, had brought proceedings against the Executor Bank, Case No. 4193, Bonneville County, Idaho, for removal of the Executor or to compel the Executor to bring such a suit against the Commission Co. There was a trial held in November, 1971, in Case No. 4193, in which R. T. & A. represented Spencers and in which Executor Bank, as well as Skelton and the Commission Co., defended against the relief sought by Spencers. At the time of the May 2, 1973 settlement that case had been fully briefed and was waiting decision by the judge. The potential of an adverse decision against Executor Bank, and thus indirectly against Spencer and his Commission Co., was a pressure point contributing

toward the package settlement, and in fact, the judge had been requested to hold up issuing a decision in Case No. 4193 pending the settlement. Res. App. Item 1.

Spencers filed an Amended Answer and Counterclaim in the specific performance action, Case No. 20,500, on November 7, 1974. This did not question venue nor demand a jury trial. Clerk's Record on Appeal to the Supreme Court of Idaho, ("R"), pp. 63-74. In 1973 Louise Spencer resided in Denver, Colorado. Pet. App. 41, 43. The case was tried to the court. R 132-142.

On January 21, 1976, the District Court, Bonneville County, Idaho, granted judgment of specific performance in Case No. 20,500, specifically enforcing both settlement agreements and ordered that the balance of the settlement price, the sum of $157,500.00 be paid by Skelton and the Commission Co. into court. Pet. App. 44-50. The court judgment specifically ruled that the funds would be held by the court for distribution following a subsequent hearing on the merits as to the claims of the parties to the funds. Pet. App. 49. Spencers, the Spencer Children, and the Executor Bank were all parties to that proceeding. Spencers appealed that decision to the Supreme Court of the State of Idaho. By decision of June 27, 1977, which became final on July 28, 1977, Pet. App. 50-51, the Supreme Court of Idaho affirmed the judgment of the trial court. The balance of $157,500.00 owing by Skelton and Commission Co., on the settlement, was paid into court. Pet. App. 6.

On August 3, 1977, R. T. & A. brought a claim in intervention, claiming an attorneys' charging lien against the funds on deposit in court, and seeking recovery of

attorneys' fees from that fund. Pet. App. 51-54. This proceeding was instituted by an affidavit of Gordon S. Thatcher which referred to a Notice of Attorneys' Claim of Lien dated February 10, 1975, which set forth fully the claim of R. T. & A. to attorneys' fees. Pet. App. 35-43. That Notice of Attorneys' Claim of Lien bore the caption of all three cases, had been filed on February 13, 1975, in the S. R. Spencer Estate, Case No. 4193, in the damage action, Case No. 13,674, and in the specific performance action, Case No. 20,500, wherein the funds were held, and had been served on counsel for Spencers, the Executor Bank, Skelton, and the Commission Co. R110-116; Pet. App. 6.

The court judgment in Case No. 20,500 specifically provided that it was binding upon the Executor Bank, and upon the estate, and a certified copy of the judgment was filed in the estate, Case No. 4193. The judgment also provided it was binding upon the parties in Case No. 13,674, and a copy of the judgment was filed in that case. Pet. App. 45-46, 47-48.

Although R. T. & A. did not file in Case No. 20,500, a pleading designated as a motion for leave to file a complaint in intervention, specifying Rule 24(a), Idaho Rules of Civil Procedure, both the District Court and the Supreme Court of Idaho treated the claim to foreclose an attorneys' charging lien for attorneys' fees as a motion for and a complaint in intervention. Pet. App. 7, 9. The allowance of intervention was heard at a District Court hearing in Case No. 20,500, wherein all other claimants to the funds held by the court, namely the Executor Bank, Spencers, and the Spencer Children, appeared by counsel and were represented. Pet. App. 61-62. At the conclu-

sion of the hearing, the District Court denied the demand for a jury trial, ordered that the parties respond to the claim by R. T. & A., and ordered that the case would proceed to trial at a date certain in Bonneville County. Pet. App. 63-64. Thereafter Spencers filed a formal response, in the nature of an answer, to the allegations of R. T. & A. Pet. App. 65-69. All parties stipulated that the funds on deposit in court be placed in an interest-bearing account pending determination of the parties entitled thereto, Pet. App. 62, and later stipulated to continuance of the trial to December 14, 1977. R 228.

The claim in intervention of R. T. & A. was tried in a regular court trial on December 14, 1977, at which R. T. & A. presented their claim in intervention, and Spencers, Spencer Children, and Executor Bank all appeared, defended, cross-examined witnesses, were heard, were permitted to submit evidence, and were allowed to submit briefs. R 231-233; Transcript of Testimony, of 216 pages, which was Reporter's Transcript on Appeal to the Supreme Court of Idaho.

Although Spencers asserted in District Court that the claim must be brought in a separate action in Twin Falls County, and that they were entitled to a jury trial, Pet. App. 60, at no time in District Court did they ever raise any federal constitutional issue. Pet. App. 57-61, 65-69.

The District Court ruled in favor of R. T. & A. on their claim to foreclose the attorneys' lien for attorneys' fees, and with no reference to any federal constitutional issue. Pet. App. 63-64, 69-73.

Spencers appealed to the Supreme Court of Idaho. Pet. App. 1-31. They did not raise in their appeal any federal constitutional question, but relied wholly upon

State law for their assertions on appeal. Res. App. Items 2 and 3.

The Supreme Court of Idaho affirmed the judgment of the District Court, awarding attorneys' fees from the funds on deposit in court and from the trust fund held by the attorneys. No reference was made to any federal constitutional issue. Pet. App. 1-18.

ARGUMENT

I. Federal Constitutional Issues were not raised below; hence certiorari should be denied.

The federal questions asserted here were never raised, preserved, or passed upon by the State courts below. Under those circumstances there is no jurisdiction for certiorari under 28 U. S. C. § 1257. *Cardinale v. Louisiana,* 394 U. S. 437 (1969); *Hill v. California,* 401 U. S. 797 (1971).

Petitioners claim to have raised federal questions at the trial. Pet. 8. But they did not. Louise Spencer raised state law questions of whether intervention was proper, whether she was entitled to a trial in the county of her present residence, and whether she was entitled to a jury trial. No mention was ever made in the trial court, of the United States Constitution nor any provision thereof, and particularly, no reference was made to Amendment 14. No mention was made in the trial court of a violation of "due process of law," nor to a denial of "equal protection of law."

Petitioners also assert that federal questions were raised on their appeal to the Idaho Supreme Court. Pet. 10. But they were not. Rule 35(a)(3), Idaho Appellate Rules, requires that an appellant's brief contain "issues presented on appeal." This requires:

> . . . a list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail.

The Appendix to this Brief quotes verbatim the Issues Presented on Appeal by Petitioner, before the Supreme Court of Idaho, Res. App. Item 2. By no stretch of the imagination can those issues be construed to encompass the federal constitutional issues now raised in this court. Rule 35(a)(5), Idaho Appellate Rules, also requires that an appellant's brief contain "points and authorities." This is stated as:

> A statement of the several propositions of law claimed to be involved in the case and the authorities relied upon by appellant.

The points and authorities of Petitioner, before the Supreme Court of Idaho, are reproduced in the Appendix. Res. App. Item 3. No proposition of federal law nor federal authority is included. There is no reference in Appellants' Brief, nor in their Reply Brief, to any proposition of federal constitutional law nor to any federal authorities.

The Supreme Court of Idaho has long adhered to the rule that assignments of error (now issues) must be specified in an appellant's brief in order to be considered on appeal, and this is especially so where there are no authorities cited nor argument contained as to the issue. *Bolen v. Baker*, 69 Idaho 93, 203 P. 2d 376 (1949); *State v. Bur-*

ris, 101 Idaho 683, 619 P. 2d 1136 (1980). Where issues of equal protection or of due process, under the United States Constitution, Amendment 14, were not specifically raised in the state courts, it was not adequate, to support the jurisdiction for certiorari, that arguments of state law have been made on the procedural or evidence issues involved. *Beck v. Washington,* 369 U. S. 541 (1962); *Moore v. Illinois,* 408 U. S. 786 (1972); *Estate of Wilson v. Aiken Industries, Inc.,* 439 U. S. 877 (1978) (Mr. Justice Blackman, concurring).

II. The state courts applied state law, without impinging on federal constitutional rights, in permitting intervention, retaining original venue, and refusing a jury trial, for equitable enforcement of an attorneys' charging lien against court-deposited funds.

Petitioners have set forth a factual model, very different from the reality of this case, to bolster their belated claim to federal constitutional issues. Analysis shows that there was not involved any invidious discrimination against clients in favor of attorneys.

A. Intervention Proper.

The state courts here did not invent intervention to permit discrimination in favor of attorneys and against a client. Intervention to claim a fund deposited in court has long been recognized in Idaho jurisprudence. *Pence v. Sweeney,* 3 Idaho [Hasb.] 181, 28 Pac. 413 (1891). Intervention of right has long been recognized under Rule 24 (a), Idaho Rules of Civil Procedure, which is identical to Rule 24 (a), Federal Rules of Civil Procedure, except

that the words "State of Idaho" replace the words "of the United States" in the Federal Rule.

Rule 24 (c), Idaho Rules of Civil Procedure, provides:

> *Procedure*—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

In this case, the motion was in the form of the Affidavit of Gordon S. Thatcher, Pet. App. 51-54, coupled with the Order and Order to Show Cause setting the claim of intervention, in the Affidavit, for hearing. Pet. App. 54-56. The trial court, in effect, permitted the intervention, and ordered the other parties, including Petitioners herein, to file pleadings setting forth their position on the matter, and the case was set for trial. Pet. App. 62-64. Petitioners herein did, in fact, file a response, in the form of an answer, Pet. App. 65-69, and the case, as previously discussed, was fully tried to the court. The pleading by R. T. & A. referred to the previous filed and served Notice of Attorneys' Claim of Lien, Pet. App. 35-43, which fully set forth the nature of the claim. Under those circumstances there is substantial compliance with Rule 24 (c), Idaho Rules of Civil Procedure. Technical forms of pleading are not required in intervention. *Farina v. Mission Inv. Trust,* 615 F. 2d 1068 (5th Cir. 1980); *Spring Constr. Co. v. Harris,* 614 F. 2d 374 (4th Cir. 1980).

Petitioners apparently contend that the application for intervention was untimely. It was actually filed within six days after the decision of the Supreme Court of Idaho became final, ordering that the funds be paid into court. Under such circumstances the application is timely. *McDonald v. E. J. Lavino Co.,* 430 F. 2d 1065 (5th Cir. 1970).

Petitioners argue, in effect, that Respondents had no claim of lien, at least as to the settlement involving the Commission Co. The record shows, Res. App. Item 1, and the Supreme Court of Idaho so found, Pet. App. 11-12, 14, that the legal services of R. T. & A. directly contributed to the full package settlement of $187,500.00, and that the attorneys' charging lien extended to the total proceeds.

The presence of the attorneys' charging lien, against the fund on deposit in Case No. 20,500, gives the basis for intervention as a matter of right under Rule 24 (a), Idaho Rules of Civil Procedure. The attorneys' charging lien was not an aribtrary creation in this case to discriminate against the client in favor of the attorney. An early Idaho case recognized an attorneys' charging lien. *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243 (1910). Following *Dahlstrom*, which found the lien lost if the client settled a judgment directly, before the lien was enforced, the Idaho legislature, in 1911, amended an attorneys' lien statute so that it now reads, Idaho Code § 3-205, as follows:

> 3-205. Attorneys' fees—Lien.—The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment.

The Supreme Court of Idaho, in this case, found the statute applicable to impress a lien upon the total package

settlement of $187,500.00. This is fully consistent with the statute where the attorneys' services were in Case No. 13,674, and the proceeds of the settlement in that case were traced directly into funds on deposit in 20,500, and the services of the attorneys were also in Case No. 4193, to make recovery for the estate of the then dormant and valueless interest in the Commission Co., and the proceeds of that settlement were directly traceable into Case No. 20,500.

This court has recognized an attorneys' charging lien enforceable in equity against the fruit of his labors. *Wylie v. Coxe*, 56 U. S. [15 How.] 415 (1853); *Ingersoll v. Coram*, 211 U. S. 335 (1908); *McGowan v. Parish*, 237 U. S. 285 (1915). And this has included by way of intervention. *Barnes v. Alexander*, 232 U. S. 117 (1914).

Petitioners assert they were not afforded the protection of the Idaho Rules of Civil Procedure. This is a mere unsupported assertion contrary to what Petitioners themselves acknowledged during the proceedings. As shown in Clerk's Record, R211, Mr. Lloyd J. Webb, as counsel for Petitioners, issued a Notice of Hearing as to their motion to strike the order, and their response to the Order to Show Cause, set for August 24, 1977, and included in that Notice this statement:

> Under Rule 7(b)(3) I. R. C. P., the said Defendants desire oral argument on this motion.

B. Original Venue Correct.

Petitioners contend that a special venue rule was applied in this case, to the benefit of the lawyers and to the detriment of their clients. To the contrary, the state courts applied the settled venue rules.

The basic venue statute, Idaho Code § 5-404, provides in material part:

> In all other cases the action must be tried in the county in which the Defendants, or some of them, reside, at the commencement of the action. . . .

Idaho Code § 5-404 provides as to non-resident defendants, a plaintiff may designate any county in Idaho. If there is a corporate defendant, action may be filed in the county where the cause of the action arose. This action, Case No. 20,500, was filed in Bonneville County on December 6, 1973. R 4. This is the county where the cause of action arose, and there is a corporate defendant, Idaho First National Bank.

Louise Spencer has made no contention that she resided in Twin Falls County, Idaho on December 6, 1973, but states in her affidavit of August 10, 1977 that her present residence is Twin Falls County, Idaho. Pet. App. 60. She was a resident of Denver, Colorado, in 1973. Pet. App. 41, 43. Trial Transcript p. 124, ll. 15-19; p. 182, ll. 6-15. She was still in Denver on January 23, 1975. R 89-108; Trial Transcript p. 138, ll. 11-14.

Although a party may request a change of venue on a discretionary basis, and based upon convenience of witnesses, as to conditions existing after commencement of an original action, the demand for change of venue, based upon residence of a Defendant, is based upon circumstances at the actual commencement of the action. *Sweeney v. American Nat. Bank*, 64 Idaho 695, 136 P. 2d 973 (1943); *Big Springs Land & Livestock Co. v. Beck*, 45 Idaho 509, 263 Pac. 477 (1928).

Consistent with that settled rule, the Supreme Court of Idaho dealt with the venue question at footnote 3 of its opinion, Pet. App. 13-14, as follows:

> Our determination that the petitioning herein was a proper method of raising and seeking to enforce the attorneys' lien regarding these claims disposes of appellant's venue objection. (Appellant asserted that venue was proper only in Twin Falls County, the county of her residence. I. C. § 5-404). Venue in the Seventh District Court in Bonneville County would be improper only if an independent action was required as to all or part of the claims here asserted by the attorneys. Such is not the case.

Thus the decision of the Supreme Court of Idaho, on venue, was on a reasonable basis and was not arbitrary. Under those circumstances, there is no issue of denial of equal protection of the law. *American Motorists Ins. Co. v. Starnes*, 425 U. S. 637 (1976).

C. No Jury of Right in Equity.

Petitioners assert discrimination in refusing a jury trial. To the contrary, the Supreme Court of Idaho applied the long-standing rule that there is no jury of right in an equitable proceeding to foreclose a lien.

An early Idaho case held that there was no right to a trial by jury, under the Idaho Constitution, in an equitable case. *Christensen v. Hollingsworth*, 6 Idaho 87, 53 Pac. 211 (1898). Earlier this court decided that a suit to enforce a mechanic's lien in Idaho Territory is a suit in equity, so that the court is not bound to submit any issue of fact to the jury in such a case. *Idaho and Oregon Land Improvement Co. v. Bradbury*, 132 U. S. 509 (1889).

In this case, the Supreme Court of Idaho recognized that the enforcement of an attorney's charging lien is an equitable procedure and upheld denial of a jury trial on that basis. Pet. App. 17.

This court has recognized the enforcement of the attorney's charging lien lies in equity. *Wylie v. Coxe*, 56 U. S. [15 How.] 415 (1853); *Ingersoll v. Coram*, 211 U. S. 335 (1908); *McGowan v. Parish*, 237 U. S. 285 (1915).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 17th day of September, 1981.

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APPENDIX

Item No.	Record Material	Reference
Item 1	Excerpts from Trial Testimony of Gordon S. Thatcher Tr. p. 10, l. 14 to p. 17, l. 24 with extraneous matter deleted:	Transcript of Trial of Dec. 14, 1977. Reporter's Transcript on Appeal to Supreme Court of Idaho.

Q. Would you state what that representation consisted of?

A. At that point there was a pending lawsuit pending in District Court in Bonneville County and it is Case Number 13-674. I think it is 13,674, actually, a suit that she had brought along with Alexa and Janet and Miriam against Leland Spencer, Carmen Spencer, Idaho Livestock Auction Company, Floyd Skelton, M. R. Skelton, and others, including the Idaho First National Bank, seeking, among other things, either damages or to set aside the sale of the interest of the estate in Skelton-Spencer Trading Company, a partnership, and Idaho Livestock Auction Company, a corporation. There had been a prior estate sale. She was aggrieved by that sale. This suit was filed to challenge the sale and it was then pending in District Court. It had been pending for a number of years. It had been to the Supreme Court and back, but had been more or less dormant for awhile. That was the principal thing and, then, of course, we were to look into other avenues of potential recovery.

• • •

It involved the assets that had been—the Auction Company, the Livestock Auction Company in Idaho Falls, really there had been the partnership I mentioned, Skelton-Spencer Trading Company. There had been Idaho Livestock Auction Company, which held the license and operated the auction. There was Idaho Livestock Commission Company which owned the real estate on which the auction was operating. All of that was involved and, of course, it involved the estate of her deceased husband, Stanley Spencer.

Q. Now, did you perform services for her in connection with a petition to remove the executor of the estate, S. R. Spencer?

A. Yes. It developed during the course of the proceedings as we analyzed the whole situation that there was a very major complaint against Idaho Livestock Commission Company and its officers and shareholders and also against the executor, if I could give a brief resume, that the commission company owned the real estate and, as near as I can recall it, it is what we call a net net lease. There was cash rent paid by Idaho Livestock Auction Company to the Idaho Livestock Commission Company in a substantial amount annually. In addition, the auction company did all the repairs, paid the insurance and paid the real estate taxes, according to my memory. The rent was collected and prior to Mr. Spencer's death salaries had been paid out and we felt we could establish a fairly reasonable connection between the shareholdings in the estate and the payment of salaries. After Mr. Spencer died the remaining shareholders continued to receive salaries, but our investigation showed that no money had ever been paid over the period of many years to the estate

for that asset. So, we filed a petition, and I am speaking from memory here. We sought to remove the executor for various grounds, including the failure to proceed on the suit involving the commission company.

* * *

We asked alternatively that the executor be compelled to bring a shareholder's suit against Idaho Livestock Auction Commission Company and its other shareholders seeking relief against them.

* * *

Q. Now, could you detail what happened after the filing of the petition to remove the executor and to have the disclaimers approved?

A. All right, we had a hearing on the day after Thanksgiving, 1971, and I think I looked that up to refresh my memory. I think it was the 26th of November, 1971. We held a hearing—I think it was in this courtroom, as I remember, before Judge McCoy, and our petition was resisted by the executor or at least the executor was here and I am sure he resisted it. Mr. Holden, Bill Holden was here on behalf of the auction company and the Skelton interest. They also resisted and gave us opposition. We held an evidenciary [sic] hearing, and I am talking from memory. I think we had some recesses where there were settlement feelers and we spent quite a bit of time trying to see if we could settle the case, but ultimately we submitted it to the judge and then the judge—let's see, the parties called for a transcript, as I remember, so a transcript had to be prepared and, following the transcript, briefs. The transcript was prepared. We filed briefs.

My recollection is that a considerable period of time went on without any briefs being filed in opposition and this is just from memory.

* * *

Then the thing went on for months even after then, even after the briefs were submitted, without a decision and it approached the time of the trial and I think the trial in Case 13,674 in district court . . .

* * *

. . . in the course of settlement negotiations the matter that a decision may be imminently ready to be issued became a point of negotiation in terms of settling the lawsuit and all other claims between the parties and the judge was advised: Look, we are trying to settle all these claims. Hold up on issuing your decision on the removal and disclaimer . . .

* * *

Then, after Case 13,674 and related matters were settled in a package settlement we were discharged before that was finally consummated and I do not know the progress of that suit since that date. We had it finally submitted and were trying to get a decision out of the judge when settlement was reached and thereafter when we were discharged as attorneys I don't know the progress of that case.

Tr. p. 25, ll. 3 to 25:

Q. Now, this may already be evidence cognizable by this Court, but, to make sure, what was the amount of the settlement reached in Case Number 13,674?

A. All right, it involved the settlement of that lawsuit as to some of the defendants—I should make that clear—expressly reserving all of the rights against Idaho First National Bank and it also involved a settlement of the claim to the Idaho Livestock Commission Company and part of the settlement was that the estate's interest in those shares would be sold and transferred and assigned to Mr. Skelton and for a lump settlement of $187,500.00. After we arrived at that lump settlement then Mr. Holden for the Skelton interest said that we ought to divide it some way between the two and they proposed a figure and it would be in the settlement documents. I think it was $150,000.00 and $37,500.00, $150,000.00 assigned to Idaho Livestock Commission Company, $37,500.00 assigned to the settling of 13,674, reserving rights against the bank. We discussed this with Louise. We discussed it with John Perry. It didn't matter to Louise or to us how it was done because it was a lump settlement which had been contemplated it would happen. So, we said, "All right, it doesn't matter to us. Go ahead and divide it that way," and the settlement documents were so structured.

Tr. p. 72, l. 2 to p. 73, l. 1.

Q. Now, could you tell us under what theory or principle do you believe that that should create a lien on the funds that have come out of Case Number 20,500?

A. All right, that proceeding which I have denominated by that title, removal of executor and approval of disclaimer of heirs included the basic contention that the executor should be removed [f]or, among other reasons, that it had failed to pursue the suit against Idaho Livestock Commission and that proceeding also included the

petition that the executor be compelled to bring that shareholder's suit. Now, when we settled the case with a package settlement the $150,000.00, although that was an arbitrary figure, that was assigned to the settlement of that claim including the stockholder's suit that we had applied and petitioned the court to compel the executor to bring. So it was directly related to the settlement. The very fact that we asked the judge to hold up ruling on that petition indicated the pressure point it was with the defendants, the Skelton defendants, and also the bank, I suppose, although they weren't in the settlement. We asked the judge to hold it up, that it was pending, that was an integral part of what [brought] about the settlement and as a result of it the $187,500.00 was brought into the estate that was not there before. So, that proceeding was an integral part of bringing about the money settlement and we are claiming our fee out of the money settlement that was brought in.

Tr. p. 82, ll. 2 to 23, with extraneous matter deleted.

Q. Now, as I understand it, you said that you were paid $30,000.00 and you refer to it as a down payment. I don't understand exactly.

A. The $30,000.00 was paid to Louise and placed in our trust account as a down payment on the aggregate settlement of $187,500.00. Then our notice of attorney's claim of lien gives a true accounting in paragraph number 9 on page 5 of what happened to those proceeds.

• • •

Q. The $30,000.00 came from Skelton?

A. Yes. That was part of the $187,500.00 package settlement. That was the down payment on it.

Item 2	Excerpt from Louise Spencer Brief on Appeal to the Supreme Court of Idaho, Case No. 12969, including a complete reproduction of "Issues presented on Appeal."	Appellants' Brief 19-20.

II.

ISSUES PRESENTED ON APPEAL

1. Were there procedural errors of prejudicial dimension committed by the trial Court in the disposition of this case:

A. Can attorneys' fees be claimed and collected in an action collateral to the case in which the fees were allegedly earned or is an independant [sic] civil action required to collect such fees.

B. In an action to collect attorneys' fees in other than the case in which the fees are allegedly earned, are the jurisdictional and venue requirements the same or different than in other cases.

C. In an action to collect attorneys' fees in other than the case in which those fees are allegedly earned are the procedural rules the same or different from those applicable to other claims.

D. In an action to collect attorneys' fees in other than the case in which the fees are allegedly earned is the defendant entitled to a jury trial.

E. Can a claim for attorneys' fees be made in any particular case, other than by independent action instituted for that purpose, where that claim does not relate to the case itself but rather relates to a totally separate area of activity on behalf of the client.

2. Was there an enforceable agreement for the payment of attorneys' fees in this case.

3. If there was such an enforceable agreement to pay attorneys' fees:

A. Did the agreement apply to the "settlement" achieved in Bonneville Case No. 13,674;

B. Did the agreement apply to that part of any "settlement" representing a price paid by a party to Case No. 13,674 for the purchase of stock owned by the Appellant in a corporate entity which was not involved in that case.

4. Assuming an enforceable agreement for the payment of attorneys' fees, has the obligation of the Appellant ripened and have the attorneys become entitled to payment in view of:

A. The fact that the decision in the Personal Representative removal/disclaimer matter has never been entered;

B. That fact that the "settlement" in Case No. 13,674 has never been implemented in that a critical factor to the completion of that "settlement" has never been accomplished, that is the obtaining of the signatures of the heirs upon the agreement of "settlement", and the payment of any settlement proceeds to the client.

Item 3	Excerpt from Louise Spencer Brief on Appeal to the Supreme Court of Idaho, Case No. 12,969, including a complete reproduction of all legal points raised on appeal, with all legal authorities cited on points 1 through 4. Legal authorities on points 5 through 9, which include no citations to federal law, are omitted.	Appellants' Brief 22-24.

IV.

POINTS AND AUTHORITIES

1. Claims for attorneys' fees, like any other claims, must be prosecuted in an independent civil action.

Benting v. Spanbauer, 58 Idaho 44, 46 (1937);

Gooding v. Lyon, 166 P. 564, 565 (Colo. 1917);

Lundy v. Cappuccio, 181 P. 165, 167 (Utah 1919);

Berrum v. Georgetta, 98 P. 2d 479, 480 (Nev. 1940);

Midvale Motors v. Saunders, 442 P. 2d 938, 941 (Utah 1968);

Lee v. Lee, 482 P. 2d 745, 747-8 (Oreg. App. 1971);

7 C. J. S. 1204 (*Attorney and Client*, § 238a);

7 C. J. S. 1208-1209 (*Attorney and Client*, § 238g);

2. Summary procedure is inappropriate for the enforcement of an attorneys' fee claim; it must be processed as are other claims.

Crawford v. Crane, 282 P. 2d 348, 351-2 (Oreg. 1955).

3. Jurisdiction and venue rules in attorneys' fee claim cases are the same as those in any other case.

7 C. J. S. 1206 (*Attorney and Client*, § 238d).

4. The same procedural rules apply to attorneys' fee claims as to any other claim.

7 C. J. S. 1205 (*Attorney and Client*, § 238b);

7 C. J. S. 1211 (*Attorney and Client*, § 238i);

In Re Sebring, 264 N. Y. S. 379 (1933);

Midvale Motors, Inc. v. Saunders, 442 P. 2d 938, 941 (Utah 1968);

Lee v. Lee, 482 P. 2d 745, 747-8 (Oreg. App. 1971).

5. Any ambiguities in a fee contract are resolved in favor of the client and against the attorney.

6. In contingent fee contract cases the percentage payable by the contract is payable only when the client collects the money; it is not payable upon the mere obtaining of a "settlement" or judgment.

7. The happening of the contingency is a condition precedent to an attorney's right to a fee in a contingent fee case.

8. In flat fee cases where an attorney contracts for a certain fee upon the completion of certain work he is not entitled to that fee until the work is completed.

9. In attorney-client contracts the claimant attorney is obliged to prove the contract was "fairly and openly made" with adequate consideration and in full knowledge of the facts and legal rights of the client.